Supreme Court, U.S.
FILED
NOV 27 2002
OFFICE OF THE CLERK

No. 02-827

In The
Supreme Court of the United States

EASTERN ASSOCIATED COAL CORP.,

Petitioner,

v.

SHELBY D. SKAGGS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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105 pp

QUESTION PRESENTED

Whether the Supreme Court of Appeals of West Virginia erred when it refused to consider whether Respondent's state law workers' compensation discrimination claim, brought pursuant to a statute that applied only to the extent that its provisions were consistent with seniority provisions of a collective bargaining agreement, was preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185?

PARTIES TO THE PROCEEDING BELOW

The Defendant-Appellee below, and the Petitioner in this Court, is Eastern Associated Coal Corp.

The Plaintiff-Appellant below, and the Respondent in this Court, is Shelby D. Skaggs.

CORPORATE DISCLOSURE STATEMENT

Petitioner Eastern Associated Coal Corp. is wholly owned by Coal Properties Corp., which is in turn wholly owned by Peabody Holding Company, Inc., which is in turn wholly owned by Peabody Energy Corporation. No publicly held company owns ten percent or more of Petitioner's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Eastern Associated Coal Corp. ("Eastern") petitions for a writ of *certiorari* to vacate and remand the judgment of the Supreme Court of Appeals of West Virginia in *Shelby D. Skaggs v. Eastern Associated Coal Corp.*, 569 S.E.2d 769 (W. Va. 2002).

OPINIONS BELOW

The decision of the Supreme Court of Appeals of West Virginia at issue in this case is published at 569 S.E.2d 769 (W. Va. 2002), and is reproduced in the Appendix to this Petition ("App.") at App. 1-24. The trial court's decision granting summary judgment in favor of Eastern was not published, and is reproduced in the Appendix at App. 25-32.

JURISDICTION

The Supreme Court of Appeals of West Virginia entered its judgment on June 28, 2002, App. at 1, and denied a timely filed Petition for Rehearing on September 5, 2002. App. at 33. Eastern invokes this Court's jurisdiction under 28 U.S.C. § 1257(a), which grants this Court jurisdiction to review by writ of *certiorari* a final judgment rendered by "the highest court of a State in which a decision could be had" where "any title, right, privilege, or immunity is . . . claimed under the . . . statutes of . . . the United States."

STATUTORY AND REGULATORY PROVISIONS AT ISSUE

At issue in this Petition is Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185(a), which provides in relevant portion that "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." App. at 34.

Additionally, relevant provisions of the West Virginia Workers' Compensation statutes and regulations are reproduced in the Appendix. App. at 35-42.

STATEMENT OF THE CASE

Respondent Shelby D. Skaggs ("Skaggs") worked for Eastern as a "motorman" at its Lightfoot No. 2 Mine in southern West Virginia. There is no dispute that the terms and conditions of Skaggs' employment at Eastern were governed by a collective bargaining agreement, called the "National Bituminous Coal Wage Agreement of 1998" ("the Contract").

On October 2, 1997, Skaggs was injured on the job when a supply motor he was operating collided with a jeep. The impact injured Skaggs' head, back and legs.

Skaggs filed a workers' compensation claim with the West Virginia Workers' Compensation Division and, because his injury had rendered him unable to return to work at Eastern, began receiving temporary total disability

benefits. Skaggs' workers' compensation benefits were effective on October 3, 1997.

Under West Virginia law, temporary total disability benefits terminate when an injured worker either reaches his or her maximum degree of medical improvement or has been medically certified to return to work. *Mitchell v. State Workmen's Compensation Commissioner*, 256 S.E.2d 1, 5-6 (W. Va. 1979). The phrase "maximum degree of medical improvement" means that the injured worker's condition will not improve further.

On August 6, 1998, Skaggs was given an independent medical examination by Dr. Paul Bachwitt, who concluded that Skaggs had reached his maximum degree of medical improvement. App. at 26. On December 11, 1998, a second physician, Dr. John Kroening, also provided Skaggs with an independent medical examination, and likewise concluded that Skaggs had reached his maximum degree of medical improvement. App. at 26.

On December 29, 1998, the Workers' Compensation Division suspended Skaggs' temporary total disability benefits based on the medical evaluations by Drs. Bachwitt and Kroening. App. at 26. On February 10, 1999, Skaggs accepted a four-percent permanent partial disability award. App. at 4.

Although Skaggs had reached his maximum degree of medical improvement, he was not able to return to his regular job as a motorman. A functional capacity evaluation showed that Skaggs could engage in light work, but could not return to his previous position either with or without reasonable accommodations for his condition. App. at 26.

Unable to return to his job as a motorman, Skaggs was a candidate for vocational rehabilitation. The West Virginia Workers' Compensation Division, in accordance with its statutory duties, has implemented by regulation a rehabilitation program to return injured workers to employment comparable in work and pay to that which the individual performed prior to the injury. W. Va. C.S.R. § 85-15-2. If a return to comparable work is not possible, the goal of the rehabilitation program is to return the individual to alternative suitable employment, using all possible alternatives of job modification, restructuring, reassignment and training. *Id.*

At the time of all events in this case, the West Virginia Workers' Compensation Division specifically permitted an employer to develop its own vocational rehabilitation program to promote injured workers to return to productive employment by contracting with physical and vocational rehabilitation service firms, provided that the service providers meet certain regulatory requirements.[1] W. Va. C.S.R. §§ 85-15-3.9.2; 8-15-13.1. App. at 37-42.

Eastern had in place an "Employer Managed Rehabilitation Program" ("the Program") designed in accordance with the Workers' Compensation Division's regulations. The Program had been specifically approved by the Commissioner of the Workers' Compensation

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[1] On June 28, 2002, the Supreme Court of Appeals of West Virginia held in *State ex rel. McKenzie v. Smith*, 569 S.E.2d 809 (W. Va. 2002), that the Workers' Compensation Division's practice of allowing employers to contract with private rehabilitation providers violated the provisions of the workers' compensation statutes and was invalid.

Division and provided that third-party administrators, such as Acordia of West Virginia and Genex Services, Inc., would administer the Program on Eastern's behalf.

On June 1, 1999, Skaggs signed an agreement to participate in rehabilitation services through the Program with the goal of obtaining a job with a new employer. App. at 26. Skaggs' participation in the Program entitled him to receive additional vocational rehabilitation benefits. W. Va. Code § 23-4-9. The rehabilitation agreement Skaggs signed noted specifically that he "was not able to return to Eastern . . . after this injury," and stipulated that he would pursue a vocational training program with the goal of being trained to work as an electrician. App. at 26.

The rehabilitation agreement signed by Skaggs provided expressly that Skaggs would be trained for employment with a new employer, and that if he disagreed with the rehabilitation plan he had the right to file an objection with the Workers' Compensation Division. App. at 26. Skaggs was represented by counsel throughout the rehabilitation process, and never protested his participation in the Program or his receipt of benefits and services pursuant to the Program.

By letter dated July 12, 1999, Eastern informed Skaggs that it was terminating his employment "[i]n accordance with the provisions of Article III(j) and Article XXIV of the current Wage Agreement. . . . "[2] That section of the Contract allows an employer to terminate an employee where examining physicians have concurred that

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[2] Relevant provisions of the Contract are set forth at App. at 56-77.

"there has been a deterioration in the physical condition which prevents the Employee from performing his regular work." App. at 57.

The discharge letter mentioned that Skaggs should "[p]lease be advised of [his] rights and obligations as defined and limited by the National Bituminous Coal Wage Agreement of 1998." App. at 47-48. Eastern's letter explained that Skaggs' employment was being terminated because "[i]t has been determined from your medical records that your physical condition is such that is [sic] prevents you from returning to your regular work at the mine." App. at 48-49.

Although the Contract provides detailed grievance and arbitration provisions, neither Skaggs nor his Union grieved or otherwise protested his discharge. Instead, on October 7, 1999, Skaggs brought a complaint in the Circuit Court of Boone County, West Virginia, alleging that Eastern "did willfully disregard [his] safety resulting in an accident causing injury to [himself]," and praying for recovery in the amount of $5,000,000.[3]

After discovery, Eastern moved the trial court for entry of summary judgment in its favor on Skaggs' claim. App. at 25. Eastern argued that Skaggs could not establish a *prima facie* case of either deliberate intent to injure or workers' compensation discrimination under West Virginia

[3] Skaggs filed his complaint *pro se*, and later amended it after retaining his present counsel. The amended complaint alleged West Virginia state law claims of deliberate intent to injure and workers' compensation discrimination.

law, and that in any event, Skaggs' discharge was in accordance with the terms of the Contract. App. at 24-32

In his response in opposition to Eastern's motion, Skaggs conceded that his deliberate intent claim failed as a matter of law, but contended that "there are significant issues of fact and law regarding the rationale for Mr. Skaggs' termination by Eastern." Specifically, Skaggs contended for the first time that he was, in fact, able to perform the duties of his regular job, and that a conspiracy existed involving Eastern and the rehabilitation service providers administering the Program to prevent Skaggs from returning to work at Eastern.[4]

In reply, Eastern argued in detail that Skaggs' contention that he was able to perform his regular job and should not have been discharged constituted a direct attack on a decision Eastern made under Article III(j)(3) of the Contract. App. at 31 n.1. Eastern pointed out that Skaggs' argument required an interpretation of the Contract, resulting in preemption of Skaggs' claim under Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185.

The trial court entered summary judgment in Eastern's favor on June 7, 2001. App. at 25-32. The court held

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[4] Simultaneous with his response brief, Skaggs filed a motion seeking again to amend his complaint, this time to drop his deliberate intent claim and restate his workers' compensation claim as a class action. Because the trial court granted summary judgment in Eastern's favor, it never ruled on this motion. App. at 22 n.3. In May, 2001, Skaggs brought a separate claim in the Circuit Court of Kanawha County, West Virginia, naming Eastern, Acordia, and Genex as parties defendant, and alleging that Eastern's Program violates the West Virginia Workers' Compensation Act and the West Virginia Human Rights Act. That case remains pending.

that "[i]rrespective of any claims Plaintiff may now make regarding the process by which he was allowed to participate in the plan, the fact is that Plaintiff voluntarily agreed to participate in the plan and acknowledged that his participation was based upon his inability to return to work with Eastern. . . . " App. at 31. The court held that Skaggs "cannot voluntarily accept the benefits of the program and then complain that he was not entitled to them." App. at 31.

The court acknowledged Eastern's contention that Skaggs' claims were preempted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, but held that because it had determined that Eastern was entitled to summary judgment on other grounds, it was unnecessary to reach that issue. App. at 31 n.1.

Skaggs appealed the trial court's grant of summary judgment to the Supreme Court of Appeals of West Virginia, and Eastern cross-appealed the trial court's failure to reach the preemption issue. App. at 43-49. The West Virginia Supreme Court issued a decision on June 28, 2002, reversing the trial court's grant of summary judgment and remanding the case for trial.

The court never addressed or mentioned in any way Eastern's cross-assignment of error concerning Section 301 preemption. Instead, the court credited Skaggs' conspiracy allegation, and based entirely on a misapplication of the law and a misapprehension of the facts, held that "an employer's use of a rehabilitation system . . . to remove an injured employee from the payroll may form the basis for a *prima facie* case of discrimination under the [Workers' Compensation] Act." App. at 21. The court summarized its holding as follows: "We hold that an employer's termination

of the employment of an injured employee because the employee *voluntarily* accepted rehabilitation services may support a claim for workers' compensation discrimination under W. Va. Code § 23-5A-1" (emphasis in original). App. at 21-22.

Eastern filed a timely Petition for Rehearing, complaining that, beyond the fact that the West Virginia high court's decision had no basis in fact or in law, the court had "completely ignore[d] the fact that Skaggs' employment with Eastern was terminated under Article III(j) of the National Bituminous Coal Wage Agreement. . . . " App. at 50-55. On September 5, 2002, the court denied Eastern's Petition for Rehearing without comment. App. at 33.

This Petition for a Writ of *Certiorari* followed.

REASONS FOR GRANTING THE PETITION

There is no question that the decision of the Supreme Court of Appeals of West Virginia has turned West Virginia workers' compensation law on its head. But Eastern does not ask or expect this Court to correct that problem, which ultimately will have to be addressed by the West Virginia Legislature.

Rather, Eastern asks this Court to correct the fact that the Supreme Court of Appeals of West Virginia has acted with utter disregard for the preemptive power of Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and refused in its decision to even acknowledge the existence of the issue. This is true in spite of the fact that the very statute upon which Skaggs' state-law claim was based, W. Va. Code § 23-5A-3, makes its protections

available only where they are consistent with the provisions of a valid and applicable collective bargaining agreement. By refusing to address this issue, the court has resolved this ease in a manner that conflicts with this Court's long line of precedent interpreting the scope of Section 301.

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ERRED WHEN IT REFUSED TO CONSIDER WHETHER RESPONDENT'S STATE LAW WORKERS' COMPENSATION DISCRIMINATION CLAIM WAS PREEMPTED BY SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT, 29 U.S.C. § 185.

Section 301 confers federal court jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce." 29 U.S.C. § 185(a). In addition to providing jurisdiction, Section 301 enables federal courts to craft federal common law reasonably necessary to effectuate the statute's objectives. This Court has held that Section 301 "expresses a federal policy that federal courts should enforce [collective bargaining] agreements" and that "the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455-56 (1957).

This Court's decision in *Lincoln Mills* giving federal courts the power to formulate common law under Section 301 formed the basis for an emerging body of case law on preemption. *See Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40, 41-42 (1st Cir.) (recounting development of Section 301 preemption), *cert. denied*, 118 S. Ct. 69 (1997). In

1962, this Court noted the importance that "substantive principles of federal labor law . . . be paramount in the area covered by the statute." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). Disputes over the interpretation of collective bargaining agreements cannot be left for resolution under state law because "the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.'" *Id.* This Court has explained that "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both negotiation and administration of collective agreements." *Id.* Indeed, the "pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action" that explicitly or implicitly includes a contention that an employer or bargaining agent breached its obligations under a labor contract. *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1, 23 (1983).

This Court has elaborated on these principles several times in recent years. In *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985), an employee subject to a labor contract filed a state law tort suit contending that his employer in bad faith failed to make disability insurance payments under a union-negotiated disability plan. The Court held this action preempted, observing that "[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210. The Court instructed that

> questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform

> federal law, whether such questions arise in the context of a suit for breach of contract or in a suit alleging liability in tort.

Id. at 211. Otherwise, "[t]he parties would be uncertain as to what they were binding themselves to" when they entered into a collective bargaining agreement, making it "more difficult to reach agreement, and disputes as to the nature of the agreement would proliferate." *Id.*

This Court in *Lueck* provided a test for Section 301 preemption to deal with these concerns: a state law claim is preempted whenever it "is inextricably intertwined with consideration of the terms of the labor contract" such that "any attempt to assess liability . . . inevitably will involve contract interpretation." *Id.* at 213, 218. In other words, whenever "resolution of a state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

This Court has reiterated the same concerns – and applied the same preemption test – in each of its subsequent rulings in this area. In *Electrical Workers v. Hechler*, 481 U.S. 851, 853 (1987), the Court held that Section 301 preempted "a state law tort claim that a union has breached its duty of care to provide a union member with a safe workplace." A court deciding that claim "would have to ascertain, first, whether the collective bargaining agreement . . . placed an implied duty of care on the Union to ensure that [the employee] was provided a safe workplace, and, second, the nature and scope of that duty." *Id.* at 862. Since "questions of contract interpretation [underlay] any finding of tort liability" the employee was "precluded

from evading the preemptive force of § 301 by casting her claim as a state law action." *Id.*

In *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), certain breach of contract claims escaped preemption where they were based on allegations that an employer had entered into individual employment contracts with the plaintiff employees at a time when they were not members of a bargaining unit or covered by any collective bargaining agreement. The employees claimed that Caterpillar had agreed that it "would provide employment opportunities for [them] at other facilities" if their work place were closed. *Id.* at 389. The claim that the employer had entered into and breached these individual employment contracts was "not substantially dependent upon interpretation" of a collective bargaining agreement, because the claim did not "rely upon" a contract or "address the relationship between the individual contracts and the collective agreement." *Id.* at 395.

Similarly, in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988), the issue was whether Section 301 preempted an employee's state law allegation that she had been discharged in retaliation for filing a workers' compensation claim. Although the employee was covered by a collective bargaining agreement that required "just cause" for discharge, the Court held that her state retaliatory discharge claim was not preempted.

The state law claim depended on a purely factual inquiry of whether the plaintiff was discharged and of whether the employer's motive for the discharge was retaliatory. Such an inquiry would "not turn on the meaning of any provision of a collective bargaining agreement." *Id.* at 407; *accord, Hawaiian Airlines, Inc. v. Norris*, 512

U.S. 246, 262 (1994). This Court has warned that Section 301 "cannot be read broadly to pre-empt nonnegotiable rights conferred on individual employees as a matter of state law." *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994).[5]

The overriding principle remains, however, as prescribed by *Lingle* and its progeny, that Section 301 preempts a state law claim, whether founded in a state's statutory or common law, if a court, in passing upon the claim, would be required to interpret a collective bargaining agreement. This Court reiterated in *Lingle* that "judges can determine questions of state law involving labor-management relations only if such questions do not require construing collective bargaining agreements." *Lingle*, 486 U.S. at 411.

The explanation for this principle lies in this Court's concern for the enforcement of arbitration clauses, which are almost always a feature of labor contracts. *Martin*, 105 F.3d at 42. "If judges construed labor agreements in the first instance, the Court believed that the arbitration process would be undermined, and there might be divergent readings of the labor agreement and interference with the grievance process." *Id.* (citing *Livadas*, 512 at 122-24 and *Lueck*, 471 U.S. at 219).

A state law claim can "depend" on the "meaning" of a collective bargaining agreement in two ways. First, a claim so qualifies if it alleges conduct that arguably

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[5] But importantly, this Court has never addressed a case like this one where the state statute on which a claim is based specifically applies only to the extent it is consistent with a valid and applicable collective bargaining agreement.

constitutes a breach of duty that arises pursuant to a collective bargaining agreement. *See United Steelworkers v. Rawson*, 495 U.S. 362, 369 (1990) ("[A] state law tort action against an employer may be preempted by § 301 if the duty to the employee of which the tort is a violation is created by a collective bargaining agreement and without existence independent of the agreement.") Second, a claim so qualifies if its resolution arguably hinges upon an interpretation of the collective bargaining agreement. *See Lueck*, 471 U.S. at 220 (finding Section 301 preemption "when resolution of a state law claim is substantially dependent upon analysis of the term of any agreement made between parties in a labor contract"). If a state law claim depends on the meaning of the collective bargaining agreement in either of these ways – that is, under *Rawson*'s "duty" rubric or under *Lueck*'s "interpretation" rubric – it is preempted.

Applying this Court's Section 301 jurisprudence, courts have applied preemption to extinguish state law workers' compensation retaliation claims in at least two recent published decisions involving similar facts and law to the present case. In *Biagini v. Berkshire Concrete Corporation*, 190 F. Supp.2d 170 (D. Mass. 2002), the court held that a former employee's state law claims alleging retaliatory discharge and discrimination in violation of a Massachusetts workers' compensation statute were preempted by Section 301, where the state statute at issue expressly conferred only rights consistent with the provisions of any applicable collective bargaining agreement.

The *Biagini* court held that because the collective bargaining agreement at issue contained provisions governing hiring, dismissal and discrimination, they could potentially conflict with the rights set forth in the workers'

compensation statute. *Id.* at 175. "At a minimum, the court would have to interpret these provisions to determine whether they are inconsistent with the rights set forth in [the workers' compensation statute]," the court wrote. *Id.* By doing so, the court held, the Court would necessarily have to engage in the forbidden interpretation of a collective bargaining agreement. Citing *Martin v. Shaw's Supermarkets, Inc.*, 105 F.3d 40, 44 (1st Cir. 1997), the court noted that a state law action is preempted "not because the collective bargaining agreement *is* inconsistent with the state claims asserted, but because it *may* be so and requires interpretation." *Id.* (emphasis in original).

Similarly, in *Troconis v. Lucent Technologies Inc.*, 160 F. Supp. 150 (D. Mass. 2001), the court held that a former employee's claim of discrimination and retaliation under state workers' compensation law was preempted by Section 301. The court wrote:

> The CBA . . . contains grievance and arbitration clauses permitting an employee to grieve, and subsequently arbitrate, any issue 'arising with respect to the interpretation or application of this Agreement or other terms and conditions of employment.' These and other provisions governing medical leave, absences, demotion, job reclassification, and acts of employer or Union discrimination, would clearly require interpretation of the CBA to determine whether a conflict exists between its detailed norms and the more general standards of [the workers' compensation statutes]. Therefore, Count III is preempted.

Id. at 156.

The courts in *Troconis*, *Biagini*, and *Martin* all emphasized the fact that their decisions were premised in

part on the fact that Massachusetts' workers' compensation discrimination statutes "contain a proviso that '[i]n the event any right set forth in this section is inconsistent with an applicable collective bargaining agreement,' the agreement shall prevail." *Martin*, 105 F.3d at 43. As the *Martin* court explained, the existence of that provision means that "Massachusetts has as a matter of state law *chosen* to make the substantive rights conferred by the statutes depend upon their not being 'inconsistent' with a labor agreement." *Id.* (emphasis in original).

Because West Virginia made the same choice as Massachusetts in this regard, precisely the same rationale applies in the case at bar. Skaggs alleged that Eastern decided to terminate his employment because he filed for and received workers' compensation benefits. His claim arose, if at all, under the provisions of W. Va. Code § 23-5A-3, which creates the cause of action for workers' compensation discrimination under West Virginia law. App. at 35-37.

That statute specifically provides that it confers protection only to the extent that it is consistent with the seniority provisions of an applicable collective bargaining agreement. It states:

> Any civil action brought under this section *shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement*, or arbitrator's decision thereunder, or to any court or administrative order applying specifically to the injured employee's employer, and shall further be subject to any applicable federal statute or regulation.

W. Va. Code § 23-5A-3(c) (emphasis added). App. at 37.

Eastern articulated a legitimate, nondiscriminatory reason for its decision to terminate Skaggs' employment – application of Article III(j)(3) of the Contract. That section of the Contract provides in relevant portion:

> That once employed an Employee cannot be terminated . . . for medical reasons over his objection without the concurrence of a majority of a group [of physicians] that there has been a deterioration in physical condition which prevents the Employee from performing his regular work.

App. at 57.[6]

In his attempt to rebut Eastern's legitimate, nondiscriminatory reason for his discharge, Skaggs attacked Eastern's application of the collective bargaining agreement provisions by claiming that there existed jobs in the mine that he could perform. It is undisputed, however, that the Contract contains detailed seniority provisions and sets forth a bidding process which governs placement in all open, classified positions. Contract, Art. XVII. App. at 59-73.

The seniority provisions of the Contract set forth the process by which all permanent vacancies and new jobs must be filled on the basis of mine seniority. Contract, Art. XVII, § (i). App. at 66-70. Job vacancies must be posted for a specified length of time and must be open for bidding by

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[6] The Contract further provides, "[t]he management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the employer." Contract, Art. IA(d). App. at 56. The Contract contains broad grievance and arbitration provisions, and detailed provisions governing medical leaves, absences, demotions, job reclassifications and similar matters.

employees. Contract, Art. XVII, § (i)(2). App. at 66-70. Jobs are filled on the basis of the seniority of the bidding employees. *Id.*

The Contract's seniority provision requires that employees, like Skaggs, who are away from work because of injury receive notice of open positions. It states, "All employees absent from work due to illness or other legitimate reason during the posting period shall be notified by management of the vacancy." *Id.*

West Virginia law makes it illegal for an employer to "fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment" upon demand if that former position is available, to a "comparable position" if it is not, and to "preferential recall" status if no comparable job exists. W. Va. Code § 23-5A-3(b). But these protections only apply where they are consistent with "the seniority provisions of a valid and applicable collective bargaining agreement." W. Va. Code § 23-5A-3(c). App. at 37.

Thus, an analysis was required to determine whether Skaggs' claim of workers' compensation discrimination conflicted with the provisions of the Contract's termination and seniority provisions. To the extent that the Contract's provisions governing termination and reinstatement of Skaggs' employment conflict with West Virginia's workers' compensation statutes, or even to the extent that those provisions *may* conflict with the statutes, Skaggs' state law claim is preempted. *Martin*, 105 F.3d at 44.

All the provisions of the Contract relating to seniority, job bidding, and termination of employment could potentially conflict with the provisions of W. Va. Code § 23-5A-3. At a minimum, a court would have to interpret these

provisions in context of the statutory requirements to determine whether they are inconsistent. It is this exercise of interpretation that Section 301 forbids. *Bishop v. Bell Atlantic Corporation*, 81 F. Supp.2d 84, 88-89 (D. Me. 1999) (finding that "in attempting to determine whether a statute is 'inconsistent' with a collective bargaining agreement . . . the Court would be engaged in the forbidden interpretation of a CBA.").

Because W. Va. Code § 21-5A-3 defers to the controlling seniority provisions of a collective bargaining agreement, and because interpretation of the Contract provisions is required to determine whether an inconsistency exists, Skaggs' claims depend on the interpretation of the terms in the Contract. As such, his claims are preempted by Section 301.

When the Supreme Court of Appeals of West Virginia ignored Eastern's preemption argument, the court disregarded this Court's Section 301 jurisprudence. Eastern urges this Court to grant Eastern's Petition and then remand this case with directions that the Supreme Court of Appeals of West Virginia resolve this case in accordance with this Court's precedent.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of *Certiorari* and vacate and remand the decision of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 2002 Term

No. 30190

SHELBY D. SKAGGS,
Plaintiff Below, Appellant

v.

EASTERN ASSOCIATED COAL CORP.,
Defendant Below, Appellee

Appeal from the Circuit Court of Boone County
Honorable E. Lee Schlaegel, Jr., Judge
Civil Action 99-C-168

REVERSED AND REMANDED

Submitted: May 1, 2002
Filed: June 28, 2002

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JUSTICE STARCHER delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE ALBRIGHT concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963).

2. "In order to make a prima facie case of discrimination under W.Va. Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W.Va. Code, 23-1-1, *et seq.*; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee." Syllabus Point 1, *Powell v. Wyoming Cablevision, Inc.,* 184 W.Va. 700, 403 S.E.2d 717 (1991).

3. An employer's termination of the employment of an injured employee because the employee voluntarily accepted rehabilitation services may support a claim for workers' compensation discrimination under *W.Va. Code,* 23-5A-1 [1978].

Starcher, Justice:

In this appeal from the Circuit Court of Boone County, we are asked to examine an order granting summary judgment against a plaintiff-employee who alleges he was terminated from his job, and thereby discriminated against by his defendant-employer, for receiving workers' compensation benefits. The defendant alleges that the plaintiff voluntarily accepted workers' compensation

rehabilitation services, and in doing so voluntarily indicated he was unable to ever return to his job – hence, his job was terminated. The plaintiff, however, alleges that the defendant is employing a complicated scheme to use the workers' compensation rehabilitation system as a way of removing employees injured on the job from its payroll.

As set forth below, after carefully examining the record we find genuine issues of material fact remain for consideration by the finder of fact. We reverse the circuit court's summary judgment order and remand the case for further proceedings.

I.

Facts & Background

Plaintiff-appellant Shelby D. Skaggs was employed as a motor man for defendant-appellee Eastern Associated Coal Corporation and was injured during the course of and as a result of his employment on October 2, 1997. The plaintiff filed a claim for workers' compensation benefits with the West Virginia Workers' Compensation Division, and received temporary total disability benefits during his recovery.

The defendant apparently had a policy mandating that injured workers submit to a functional capacity evaluation before being allowed to return to work. In a letter written to the plaintiff's doctor on October 20, 1997, 18 days after the plaintiff's injury, a workers' compensation claims administrator working on the defendant's behalf stated:

> Eastern Associated Coal Corporation is participating in a Rehabilitation Program approved by

> the Workers' Compensation Division. As part of this program, Eastern Associated Coal Corporation employees are required to complete a Functional Capacity Evaluation . . . .
>
> Please do not return claimant to work prior to the initial functional capacity evaluation as their employer cannot accept them without this evaluation being completed.

In accordance with this company policy, on April 6, 1998, apparently before the plaintiff's injuries had fully healed, the plaintiff was required by the defendant to submit to a "functional capacity evaluation." The report generated by the evaluator stated that the plaintiff could engage in light work, but that the plaintiff "is currently unable to return to his former position as a Motorman[.]"

Several months later, the plaintiff was evaluated by two different doctors – Dr. Paul Bachwitt in August 1998 and Dr. John Kroening in December 1998. Both doctors concluded that the plaintiff had fully recovered and reached his maximum degree of medical improvement. Based upon these evaluations, the Workers' Compensation Division suspended the plaintiff's temporary total disability benefits on December 29, 1998, and the plaintiff was awarded a 4% permanent partial disability award.

Dr. Bachwitt's report indicated that the plaintiff "could return any time" to his customary duties with the defendant and "should either be returned to work or put into a work hardening program." Dr. Bachwitt also indicated that he felt the claimant was a candidate for vocational rehabilitation because "I feel all individuals are vocational rehabilitation candidates." Dr. Kroening similarly reported that the plaintiff did not need "restrictions,

accommodations or restrictive devices . . . to carry out usual activities or meet . . . appropriate occupational demands," but did state that "[i]t would be reasonable to avoid hyperextension of the neck."

The defendant's workers' compensation claims were managed by a third-party administrator called Acordia. On May 13, 1999, a "senior compensation specialist" at Acordia, acting on behalf of the defendant, wrote a letter to the plaintiff. The letter stated that, based upon the functional capacity evaluation and the two doctors' reports, the plaintiff was being referred to Genex Services, Inc., a company that "provides vocational rehabilitation services to employees who cannot return to their previous job in any capacity." The letter noted that the rehabilitation program was voluntary, and that "[u]pon agreeing to participate in this program and while continuing to participate, [the plaintiff] will be eligible to receive . . . workers' compensation benefits at the temporarily totally disabled rate."

The plaintiff met with a representative from Genex on June 1, 1999, and signed a document entitled "Notification Regarding Rehabilitation Services . . . Hierarchy of Rehabilitation Services." In accordance with regulations promulgated by the Workers' Compensation Division,[1] the

[1] The regulation, 85 C.S.R. § 15-4 establishes the following seven "priorities" that are to be followed in providing rehabilitation services. The regulations specify that the workers' compensation commissioner must use the lower-numbered priorities unless the commissioner – and *not* a private rehabilitation service provider – determines that those priorities are "inappropriate" for the injured claimant. Only then may a higher-numbered priority be attempted. *See State ex rel. McKenzie v.*

(Continued on following page)

document listed the seven steps in the "required hierarchy of rehabilitation services" as follows:

Smith, ___ W.Va. ___, ___, ___ S.E.2d ___, ___ (Slip Op. at 31) (No. 29645, June 28, 2002).

The regulation states:

> 4.1. Qualified rehabilitation professionals must utilize the following priorities. No higher numbered priority may be utilized unless the commissioner has determined that all lower numbered priorities are unlikely to result in the placement of the injured worker into suitable gainful employment. If a lower numbered priority is clearly inappropriate for the injured worker, the next higher numbered priority must be utilized. The rehabilitation plan must explicitly state the reasons and rationale for the rejection of any lower numbered priority. The priorities are as follows:
>
> 4.1.1. Return of the injured worker to the preinjury job with the same employer;
>
> 4.1.2. Return of the injured worker to the preinjury job with the same employer and with modification of task, work structure or work hours;
>
> 4.1.3. Return of the injured worker to employment with the same employer in a different position;
>
> 4.1.4. Return of the injured worker to employment in a different position with the same employer and with on-the-job training;
>
> 4.1.5. Employment of the injured worker by a new employer and without training;
>
> 4.1.6. On-the-job training of the injured worker for employment with a new employer; or
>
> 4.1.7. Enrollment of the injured worker in a retraining program which consists of a goal-oriented period of formal retraining designed to lead to suitable gainful employment in the labor market; provided, that there exists a reasonable expectation of the injured worker actually obtaining such employment upon completion of the program.

1. Return of the employee to the pre-injury job with the same employer.

2. Return of the employee to the pre-injury job with the same employer with modification of tasks, work structure and work hours.

3. Return to employment with the pre-injury employer in a different position.

4. Return to employment with pre-injury employer with on-the-job training.

5. Employment with a new employer without training.

6. On-the-job training for employment with a new employer.

7. Retraining which shall consist of a goal-oriented period of formal retraining which is designed to lead to suitable gainful employment.

The document also states, at the top, that "[c]lear objective documentation must exist indicating that the lower numbered plan is not appropriate in the given claim before a higher number can be considered."

At the bottom of the document is the statement that Genex had "explained those rehabilitation services that could be made available" to the plaintiff, and had "recommended number 5 of the hierarchy of rehabilitation services." In other words, Genex recommended that the plaintiff be employed with a new employer without receiving any training. The plaintiff checked a box at the bottom stating he was "willing and agree[d] to participate in rehabilitation services at this time," and signed the document.

Subsequently, on July 12, 1999, approximately six weeks after signing the Genex document, the plaintiff was sent a form letter by the defendant informing him his employment was terminated because "[i]t has been determined from your medical records that your physical condition is such that is [sic] prevents you from returning to your regular work at the mine." No mention is made in the letter about the Genex document signed by the plaintiff.

The defendant, however, now characterizes the Genex document as, essentially, a contractual agreement by the plaintiff to accept rehabilitation services with the goal of obtaining employment with a new employer. In other words, the defendant interpreted the plaintiff's "voluntary" acceptance of rehabilitation services as his written concession that his physical condition was not going to improve, and that he was prevented by his physical condition from ever returning to employment with the defendant. On the basis of this "voluntary" statement by the plaintiff – as well as the plaintiff's medical records – his employment was terminated.

The plaintiff, however, argues that when he signed the document he did not intend to "voluntarily" give up his job with the defendant – instead, he argues he signed the document intending to accept whatever rehabilitation services Genex would provide. He also argues that his medical records support that he could return to work at his prior position.

Furthermore, the plaintiff contends that his referral to rehabilitation at Step Five was part of a complex scheme by the defendant to discriminate against employees who receive workers' compensation benefits. He

asserts that contrary to the statement at the top of the document, Genex had no "clear objective documentation . . . indicating that the lower numbered plan[s]" were not appropriate in the plaintiff's case. The plaintiff asserts that the defendant has produced no documentation indicating why Steps One through Four of the rehabilitation hierarchy were ignored. Instead, the plaintiff contends that he was referred directly to Step Five of the rehabilitation hierarchy primarily because of an unwritten company policy of the defendant.

As evidence of this unwritten policy, the plaintiff cites to the deposition of the senior compensation specialist at Acordia who referred the plaintiff for rehabilitation. She testified that:

> A. Under Eastern's Employer Managed Rehab Plan claims don't get referred to a rehab specialist until it is Step 5 of the hierarchy, which means they can't return to work for the preinjury employer. And Step 5 is seeking employment with a new employer. . . .
>
> Q. Who made the decision that it was at Step 5?
>
> . . .
>
> A. The medical records in the file determined that he was not capable of returning to the preinjury employer, which is Steps 1-4. The file was generated to me by the nurse/case manager on the claim. . . .
>
> Q. So by the time the referral was made to you, by the time the file was given to you, somebody had made the decision that it was at Step 5?
>
> A. Yes.

Furthermore, the Acordia specialist testified that injured employees of the defendant were never referred to rehabilitation for anything other than Step Five. She stated:

> A. We work with Eastern Associated Coal closely and know that there is not any modified duty available for injured workers. If they can't return to their preinjury job, then there is no work available for them. . . . We discuss it at claims-review meetings or telephone conversations. . . .
>
> Q. You have had discussions with employees at meetings and conversations and you know . . . that if you can't return to your preinjury job at Eastern you are at Step 5. . . .
>
> A. Yes.
>
> Q. How many cases have you done involving the Eastern people and referrals to rehab?
>
> A. I couldn't give you a specific number. . . . Probably closer to 50, and that is an estimate.
>
> Q. So in every one of those cases you have been aware that if they couldn't return to their past work they are at Step 5 if they agree to go into rehab?
>
> A. Yes. . . .
>
> Q. Would you consider that a policy that you are following? . . . If someone comes to you with a referral to rehab, then they are at Step 5? . . .
>
> A. Yes.
>
> Q. Is that published anywhere?
>
> A. No.

Q. Is it in any documents that you have seen?

A. No.

Q. But it is something that you know routinely?

A. Yes.

Q. Without exception? . . .

A. I have never had an exception.

The plaintiff filed the instant action on September 30, 1999,[2] alleging that he was discriminated against and illegally discharged from his job on account of his receipt of workers' compensation benefits, in violation of *W.Va.Code,* 23-5A-1 [1978]. The plaintiff's theory was that the rehabilitation process utilized by the defendant was discriminatory in nature.

After conducting discovery, and particularly after the above-quoted deposition, the plaintiff moved to amend his complaint to add as defendants Acordia and Genex. He also moved to certify the case as a class action, arguing that the evidence showed that up to 50 other people had lost their jobs with the defendant due to the allegedly discriminatory use of the workers' compensation rehabilitation system by the defendant.

---

[2] The procedural history of this case is somewhat convoluted. The plaintiff, acting *pro se,* initially filed the instant action alleging that the defendant deliberately and intentionally harmed him, in violation of *W.Va.Code,* 23-4-2 [1994]. The plaintiff later hired an attorney who, after conducting an investigation, abandoned the plaintiff's "deliberate intent" cause of action. The plaintiff later amended his complaint to assert discrimination in violation of the Workers' Compensation Act.

The circuit court did not rule upon the plaintiff's motions. Instead, upon a motion of the defendant, the circuit court granted summary judgment against the plaintiff. In an order dated June 7, 2001, the circuit court found that the plaintiff voluntarily signed the "agreement" to accept rehabilitation services "with a goal of obtaining employment with a new employer." The circuit court also found that the plaintiff received temporary total disability benefits while receiving rehabilitation services, and that the plaintiff never objected to the rehabilitation services provided by the defendant.

The circuit court concluded that the plaintiff "voluntarily participated in the rehabilitation program developed in accordance with the rules and regulations promulgated by the Workers' Compensation Division." Because the plaintiff "acknowledged that his participation was based upon his inability to work with Eastern," the circuit court ruled that the plaintiff could not "voluntarily accept the benefits of the program and then complain that he was not entitled to them." The circuit court therefore held that the plaintiff had failed to establish the elements of a wrongful discharge cause of action under the Workers' Compensation Act, and granted summary judgment to the defendant.

The plaintiff now appeals the circuit court's June 7, 2001 order.

II.

Standard of Review

As we stated in Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), we review a circuit court's entry of summary judgment under Rule 56 of the

West Virginia Rules of Civil Procedure [1998] *de novo.* The traditional standard for granting summary judgment was established in Syllabus Point 3 of *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963) where we held:

> A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.

In accord, Syllabus Point 1, *Fayette County Nat. Bank v. Lilly,* 199 W.Va. 349, 484 S.E.2d 232 (1997); Syllabus Point 1, *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995); Syllabus Point 2, *Painter, supra.*

With this standard in mind, we examine the arguments of the plaintiff.

III.

Discussion

The plaintiff contends on appeal that summary judgment was improper because genuine questions of material fact exist regarding whether the defendant unlawfully discriminated against the plaintiff.

The Workers' Compensation Act ("the Act"), *W.Va.Code,* 23-5A-1 [1978] establishes the following prohibition against discrimination:

> No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter.

This Court held, in Syllabus Point 1 of *Powell v. Wyoming Cablevision, Inc.,* 184 W.Va. 700, 403 S.E.2d 717 (1991), that

> In order to make a prima facie case of discrimination under W.Va.Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers' Compensation Act, W.Va. Code, 23-1-1, *et seq.*; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee.

The defendant concedes that the plaintiff has satisfied the first two elements of *Powell,* because the plaintiff had an on-the-job injury and filed a workers' compensation claim. The defendant argues, however, that the plaintiff introduced no evidence whatsoever that his discharge was in any way related to his filing of a workers' compensation claim. The defendant argues that the plaintiff, by signing the Genex document, "admitted that he could not return to work, "and that the medical evidence in the case established that the plaintiff was only capable of functioning at the light physical demand level. The defendant therefore contends it was within its rights to terminate the plaintiff because he was medically unable to ever return to his regular job.

The plaintiff, however, first argues that a finder of fact could draw inferences from the circumstances and documents in the record that are favorable to the plaintiff, and that summary judgment was therefore inappropriate. As this Court has made clear, courts considering motions for summary judgment "must draw any permissible inference from the underlying facts in the light most favorable to the

party opposing the motion." *Painter v. Peavy,* 192 W.Va. at 192, 451 S.E.2d at 758. "Summary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.'" *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995), *quoting Pierce v. Ford Motor Co.,* 190 F.2d 910, 915 (4th Cir.), *cert. denied,* 342 U.S. 887, 72 S.Ct. 178, 96 L.Ed. 666 (1951).

The plaintiff asserts that the Genex document was not an "admission" that he could not return to his job with Eastern, and that the document has an alternate interpretation: it was merely the plaintiff's acknowledgment that he was voluntarily participating in the rehabilitation plan created by the defendant's agent, Genex. Furthermore, the plaintiff asserts that a fact finder could infer from the record that he and his doctors believed all along that he could return to his job. The plaintiff contends that these inferences, which are favorable to the plaintiff's position, can be derived from the existing record and that the circuit court therefore erred in granting summary judgment.

The plaintiff suggests that he did not return to work because he was prevented from doing so by the defendant's policies, which thereby compelled him to "voluntarily" participate in a rehabilitation program – and his participation in the rehabilitation program resulted in his termination from employment. The plaintiff's second argument, therefore, is that the evidence, particularly the deposition of the Acordia compensation specialist, establishes that the defendant is misusing the workers' compensation rehabilitation system to terminate workers who have been seriously injured in the course of and as a result of their employment. The plaintiff asserts that the

defendant is violating the rules and statutes concerning workers' compensation rehabilitation by only referring injured workers to rehabilitation at Step Five, whereby the injured worker must seek employment with another employer without receiving any rehabilitation or training. The plaintiff argues that this use of the rehabilitation system constitutes discrimination under the Act.

We begin our consideration of this argument by examining the workers' compensation rehabilitation system. The Act provides benefits to workers' who have "received personal injuries in the course of and resulting from their covered employment[.]" *W.Va.Code,* 23-4-1 [1989]. The benefits available include rehabilitation services such as "vocational or on-the-job training, counseling, assistance in obtaining appropriate temporary or permanent work site, work duties or work hours modification, . . . crutches, artificial limbs, or other approved mechanical appliances, or medicines, medical, surgical, dental or hospital treatment[.]" *W.Va.Code,* 23-4-9(b) [1999].

However, the Act clearly requires that the Workers' Compensation Commissioner – and not employers or their agents – develop and direct a claimant's rehabilitation plan. *W.Va.Code,* 23-4-9(b) states, in pertinent part:

> [T]he commissioner shall at the earliest possible time determine whether the employee would be assisted in returning to remunerative employment with the provision of rehabilitation services and if the commissioner determines that the employee can be physically and vocationally rehabilitated . . . the commissioner shall forthwith develop a rehabilitation plan for the employee and, after due notice to the employer, expend

> such an amount as may be necessary for the aforesaid purposes[.]

Furthermore, the Act provides that "it is the shared responsibility of the employer, the employee, the physician and the commissioner to cooperate in the development of a rehabilitation process designed to promote reemployment for the injured employee." *W.Va.Code,* 23-4-9(a). However, any rehabilitation process must be "pursuant to a rehabilitation plan developed and monitored by a rehabilitation professional for each injured employee." *W.Va.Code,* 23-4-9(b).

We recently interpreted the statutes pertaining to rehabilitation in *State ex rel. McKenzie v. Smith,*___ W.Va. ___, ___ S.E.2d ___ (No. 29645, June 28, 2002). In *McKenzie,* we were asked to examine a system of "employer's preferred providers for rehabilitation services" similar to that in the instant case. The petitioner in that case sought to prohibit the Workers' Compensation Commissioner from referring claimants exclusively to rehabilitation service providers who had contracts with the claimants' employers to be the "employer's preferred provider."

We held, at Syllabus Point 8 of *McKenzie,* that only the Commissioner is empowered by the Workers' Compensation Act to develop a rehabilitation plan for an injured employee, but that such a plan should be a joint effort between the employer, the claimant, the claimant's physician, a rehabilitation professional, and the Commissioner:

> When the Workers' Compensation Commissioner determines that a claimant is a candidate for rehabilitation services, *W.Va.Code,* 23-4-9 [1999] requires the Commissioner to develop and

> implement a plan for the claimant's rehabilitation services. The Commissioner must, with the assistance of the claimant's rehabilitation professional develop and monitor the rehabilitation plan, and the employer, the claimant, the claimant's physician and the Commissioner must cooperate in the development of the rehabilitation plan.

From this premise, we examined various statutes and their application to a system whereby employers entered into contracts with rehabilitation service providers to be the exclusive provider of services for injured employees. We held, at Syllabus Point 6, that:

> Under *W.Va.Code,* 23-4-3(b) [1995], an employer is prohibited from entering into any contract with a health care provider for purposes of providing services, including rehabilitation services, to employee-claimants injured in the course of and as a result of their employment.

We noted that this statutory prohibition was of such import to the Legislature that its violation could form the basis for civil and criminal penalties. We further held, at Syllabus Point 7, that:

> Under *W.Va.Code,* 23-4-3(b) [1995], a claimant has a right to select his or her initial health care provider or provider of rehabilitation services for the treatment of a compensable injury or disease. If the claimant thereafter wishes to change his or her provider, and if the employer participates in a program to manage health care costs, then the claimant must choose a provider through the employer's managed care program. If the claimant thereafter wishes to change his or her provider, and if the employer does not

> participate in a managed care program, but the Division does participate in a managed care program, then the Division may choose the claimant's new provider through its managed care program.

Taken together, the beneficent purpose of these two provisions "is to protect a claimant's interest in determining his or her own course of treatment for a compensable injury." ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 20).

We concluded in *McKenzie* that a system of using an "employer's preferred provider for rehabilitation services" was unenforceable under the Act. First, an agreement between an employer and a rehabilitation service provider to be the "employer's preferred provider" of services to employees injured on-the-job would violate *W.Va.Code,* 23-4-3(b) [1995]. Second, requiring an injured claimant to seek initial treatment from a rehabilitation service provider chosen by the employer would also violate a claimant's right to choose his or her initial provider of services, as required by *W.Va.Code,* 23-4-3(b) [1995]. Lastly, only the Commissioner – and not the employer – has the authority to develop a rehabilitation plan for a claimant, with the assistance of a rehabilitation professional, and with the cooperation of the employer, the claimant, and the claimant's physician.

In the instant case, the defendant crafted a complicated system that appears to be contrary to each of the statutes discussed in *McKenzie.* The defendant had an agreement with Acordia and Genex to provide rehabilitation services for employees such as the plaintiff who were injured on the job. Furthermore, the plaintiff was not given an opportunity to initially choose his own rehabilitation service provider (and, in fact, does not appear to have

even sought rehabilitation services). Lastly, the defendant – and not the Commissioner – referred the plaintiff to Genex, incorrectly suggesting in the referral letter that rehabilitation services are only for "employees who cannot return to their previous job in any capacity," and created a rehabilitation plan that began at Step Five, all without any consultation with the Commissioner.

After carefully reviewing the record, we can infer that the defendant may have employed this complicated system to remove from its payroll employees who sustain injuries in the course of and resulting from their employment. To begin, in a letter written to the plaintiff's doctor 18 days after the plaintiff's injury, a representative for the defendant indicated that as part of the defendant's "approved" rehabilitation program, the plaintiff could not be returned to work without having a functional capacity evaluation. This letter was written 20 months before the plaintiff was ever referred to the rehabilitation program, and the functional capacity evaluation (performed four to eight months before the plaintiff had completed his recovery from his injuries) was, in part, the basis for the plaintiff's referral.

Furthermore, even though two doctor's reports indicated the plaintiff could return to the defendant for work, a claims representative at Acordia unilaterally determined that the plaintiff should instead be referred to a rehabilitation provider, Genex.

Remarkably, the claims representative, and not the rehabilitation provider, appears to have determined that rehabilitation should begin at Step Five – that is, that the plaintiff was to obtain a job with another employer without receiving any training. As previously stated, the

regulations of the Division "place the responsibility for classifying a claimant's condition in the rehabilitation hierarchy in the Commissioner," and not in the employer. *McKenzie,* ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 32-33). Workers' compensation regulations state:

> No higher numbered priority may be utilized unless the *commissioner* has determined that all lower numbered priorities are unlikely to result in the placement of the injured worker into suitable gainful employment.

85 C.S.R. § 15-4.1 (emphasis added). The record suggests that the defendant's representative at Acordia never referred a claimant employed by the defendant to rehabilitation at any step other than Step Five, and had done so in approximately 50 other cases. We presume that in each of these cases, as with the plaintiff's case, the claimant's job with the defendant was terminated.

In sum, the defendant relied upon a system that apparently was in contravention of the Workers' Compensation Act, and that was employed in a fashion contrary to the dictates of the workers' compensation statutes and regulations, to suggest that the plaintiff "voluntarily" relinquished his job and sought employment elsewhere because he was unable to perform his job, or any job, with the defendant.

We believe that an employer's use of a rehabilitation system, particularly one that is contrary to the Act, as discussed in *State ex rel. McKenzie v. Smith,* to remove an injured employee from the payroll may form the basis for a *prima facie* case of discrimination under the Act. We hold that an employer's termination of the employment of an injured employee because the employee *voluntarily*

accepted rehabilitation services may support a claim for workers' compensation discrimination under *W.Va.Code,* 23-5A-1.

We believe that the employer's use of a system of preferred providers for rehabilitation services in the instant case could be interpreted as a pretext for a scheme to terminate employees who had received workers' compensation benefits. We therefore find that substantial questions of material fact remain, and that the circuit court erred in granting summary judgment to the defendant.[3]

IV.

Conclusion

We reverse the circuit court's June 7, 2001 summary judgment order, and remand this case for further proceedings.

Reversed and Remanded.

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[3] The plaintiff also contends that the circuit court erred in not allowing the plaintiff to amend his complaint to add as defendants Acordia and Genex and add an additional cause of action for fraud, and in not allowing the plaintiff to certify a class action on behalf of other individuals affected by Eastern Associated's, Acordia's, and Genex's alleged misconduct. Because the circuit court did not reach the merits of these motions by the plaintiff, we decline to address them, and leave them for the circuit court to address on remand.

No. 30190 – *Skaggs v. Eastern Associated Coal Corp.*

(Filed July 17, 2002)

Davis, C.J., concurring:

In this case, the majority reversed an order granting summary judgment to the appellee, Eastern Associated Coal Corp., and remanded the action to allow Mr. Skaggs to pursue his claim of discriminatory termination.[1] I agree with this disposition. However, I have chosen to write separately because I strongly disagree with the majority's partial reliance upon the decision in *State ex rel. McKenzie v. Smith,* ___ W. Va. ___, ___, S.E.2d ___ (No. 29645, June 28, 2002), in resolving this appeal.

McKenzie was wrongly decided and has no application to Mr. Skaggs' case.[2] The decision in *McKenzie* concerned the discretionary authority of the Commissioner to allow employers to submit a list of preferred vocational rehabilitation service providers. Thus, *McKenzie* has no relevance to the instant claims involving discriminatory termination.

---

[1] Under W. Va.Code § 23-5A-1 (1978) (Repl.Vol.1998) an employer may not terminate an employee as a result of the employee receiving workers' compensation benefits. The statute provides succinctly: "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter."

[2] I dissented in *McKenzie* on the basis that the majority did not have authority to re-write workers' compensation statutes, under the guise of the rule of liberality, in order to undermine the discretionary authority of the Commissioner of the Workers' Compensation Division to allow employers to submit the names of preferred vocational rehabilitation providers. *See State ex rel. McKenzie v. Smith,* ___ W. Va. ___, ___ S.E.2d ___ (No. 29645 June 28, 2002) (Davis, C.J., dissenting, with Maynard, J., joining).

The issue posed by Mr. Skaggs was controlled exclusively by our prior decisions concerning discrimination under W. Va.Code § 23-5A-1 (1978) (Repl.Vol.1998), and this case should have been resolved on that basis alone.

In view of the foregoing, I concur. I am authorized to state that Justice MAYNARD joins me in this concurring opinion.

IN THE CIRCUIT COURT OF BOONE COUNTY, WEST VIRGINIA

SHELBY D. SKAGGS,

Plaintiff,

v. **CIVIL ACTION NO.: 99-C-168**
Honorable E. Lee Schlaegel, Jr.

EASTERN ASSOCIATED COAL CORP.,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Before the Court is the Defendant's Motion for Summary Judgment. The Court has reviewed the memoranda and exhibits submitted by the parties, and has heard the arguments of counsel. As such, Defendant's Motion is ripe for decision, and is due to be granted as a matter of law.

Undisputed Material Facts

The material facts in this matter are undisputed. Plaintiff was a motor man for Eastern Associated Coal in its Lightfoot #2 Mine when he was injured on October 2, 1997. At the time he was injured, Plaintiff was operating a supply motor which collided with a jeep. The resulting impact caused injury to Plaintiff's head, back and legs.

Subsequently, Plaintiff filed a workers' compensation claim and began receiving workers' compensation benefits in accordance with the West Virginia Workers' Compensation Act. In fact, Plaintiff was awarded temporary total disability benefits because of his inability to return to work following the injury.

On August 6, 1998, Plaintiff was evaluated by Dr. Paul Bachwitt in relation to his workers' compensation injury. Dr. Bachwitt concluded the Plaintiff had reached maximum degree of medical of [sic] improvement. Additionally, Dr. John Kroening performed an evaluation of Plaintiff on December 11, 1998, and likewise concluded Plaintiff had reached maximum degree of medical improvement. Consequently, Plaintiff's temporary total disability benefits were terminated.

Plaintiff underwent a functional capacity evaluation to determine his physical capabilities. This evaluation revealed Plaintiff was only capable of functioning at the light physical demand level.

Based upon a review of the file, a determination was made that Plaintiff required vocational rehabilitation services in order to return to employment. Therefore, by letter dated May 13, 1999, Plaintiff was notified his claim was being referred to Genex for vocational rehabilitation services. A qualified rehabilitation professional then met with Plaintiff regarding vocational rehabilitation services. On June 1, 1999, Plaintiff agreed to participate in the rehabilitation services and agreed to participate in said services with a goal of obtaining employment with a new employer. He signed an agreement to that effect and that Agreement advised him to seek the assistance of counsel with respect to the nature of that agreement. After Plaintiff entered in to the rehabilitation agreement, he began receiving vocational rehabilitation benefits. Although they were paid at the same rate as temporary total disability benefits, the statute and regulations clearly designate those benefits to be different from temporary total disability benefits. Throughout the vocational rehabilitation process, Plaintiff was represented by counsel and at no

time filed any protest regarding his receipt of vocational rehabilitation benefits and/or services.

By letter dated July 12, 1999, Plaintiff was informed that his employment with Eastern was being terminated under the provisions of the National Bituminous Coal Wage Agreement, due to the fact that he was medically prevented from returning to work at Eastern. Plaintiff's termination letter informed him that his discharge was being effectuated pursuant to provisions of Article III(j), which provides that an employer may terminate an employee if it has determined that "there has been a physical deterioration which prevents an employee from performing his regular work." This letter further asserted that Plaintiff's rights with regards to the termination were governed by the NBCWA. He filed no grievance and did not attempt to protest his termination under the NBCWA.

Plaintiff ultimately began participating in a vocational retraining program aimed at the goal of retraining Plaintiff to become a licensed journeyman electrician. Again, while participating in the retraining program, Plaintiff was paid vocational rehabilitation benefits. Subsequently, Plaintiff brought this action alleging wrongful discharge pursuant to the anti-discrimination statute of the Workers' Compensation Act.

Ruling of the Court

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." W.Va. R. Civ. P. 56(b). In order for a nonmoving party to survive

a motion for summary judgment, that party must satisfy the burden of proof by offering more than a mere scintilla of evidence, and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755, 758 (1994). As such, summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Mumaw v. U.S. Silica Co.*, 204 W. Va. 6, 511 S.E.2d 117, 119 (1998). Application of these standards to the undisputed material facts requires the entry of summary judgment in favor of the Defendant as a matter of law.

While the parties disagree on whether any or all of the required elements under the anti-discrimination provisions of the Workers' Compensation Act have been met, the Court finds that it is clear that the Plaintiff has failed to offer evidence to establish that he was wrongfully discharged.

It should be noted that the plaintiff initially filed this action as a deliberate intent action under W. Va. Code § 23-4-2. He subsequently filed an amended complaint to allege discrimination under the Workers' Compensation Act. He abandoned his deliberate intent claim in the face of Defendant's Motion for Summary Judgment, leaving only the Motion for Summary Judgment on the discrimination claim for this Court to consider.

Plaintiff contends he was terminated in a discriminatory manner because of his receipt of workers' compensation benefits. Under the West Virginia Workers'

Compensation Act, there are two provisions that make it unlawful to discharge an employee because the employee applied for or received workers' compensation benefits. The first is the general anti-discrimination provision, West Virginia Code §23-5a-1 which provides:

> No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this Chapter.

The second anti-discrimination provision contained in the Workers' Compensation Act is found at West Virginia Code §23-5a-3 which provides, in relevant part:

> (a) It shall be a discriminatory practice within the meaning of section 1 of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of Article IV of this Chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly as related to the injury or absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due the injury or any other absence from work.
>
> (c) Any civil action brought under this action shall be subjected to the seniority provisions of a valid and applicable collective bargaining agreement or arbitrator's decision thereunder or to any Court or administrative order applying

> specifically to the injured employee's employer, and shall further be subject to any applicable Federal Statute or Regulation.

It is undisputed that Plaintiff was injured on October 2, 1997, and subsequently filed a claim for workers' compensation benefits. Moreover, it is clear that Plaintiff's claim was ruled compensable by the Workers' Compensation Division and he began receiving temporary total disability benefits. Plaintiff continued to receive temporary total disability benefits through December 29, 1998, when the Workers' Compensation Division issued a letter suspending temporary total disability benefits. The suspension of those benefits was based upon an independent medical evaluation report by Dr. Kroening dated December 11, 1998, indicating Plaintiff had reached maximum medical improvement and was entitled to a permanent partial disability award.

On February 8, 1999, the Workers' Compensation Division issued an order closing Plaintiff's claim for temporary total disability benefits. He did not protest that closing. Plaintiff was not discharged from his employment until September 12, 1999, well after he had ceased receiving temporary total disability benefits, and at a time when he was not eligible to receive any such benefits. Thus, Plaintiff was not terminated from his employment while receiving or eligible to receive temporary total disability benefits. As such, he is not covered by W. Va. Code § 23-5A-3(a). While paid at an equivalent rate, vocational rehabilitation benefits under the regulations and the regulations of the Workers' Compensation Division are not temporary total disability benefits.

Plaintiff further contends that the rehabilitation process utilized by Eastern is discriminatory in nature.

The record shows that Plaintiff voluntarily participated in the rehabilitation program developed in accordance with the rules and regulations promulgated by the Workers' Compensation Division. Irrespective of any claims Plaintiff may now make regarding the process by which he was allowed to participate in the plan, the fact is that Plaintiff voluntarily agreed to participate in the plan and acknowledged that his participation was based upon his inability to return to work with Eastern, Skaggs stated he cannot voluntarily accept the benefits of the program and then complain that he was not entitled to them.[1]

Based upon the foregoing and the record in this case, the Court finds Plaintiff has failed to establish the elements of a wrongful discharge cause of action under the anti-discrimination provisions of the Workers' Compensation Act. Defendant has met its burden in establishing that there is no issue of material fact and the plaintiff has failed to show that any such issue exists. Accordingly, it is hereby ORDERED that the Defendant's Motion for Summary Judgment is hereby GRANTED, that summary judgment be entered in favor of the Defendant, and that this matter be dismissed and stricken from the docket of this Court.

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[1] Defendant contends that Plaintiff was terminated under the provisions of the NBCWA and, accordingly, that plaintiff's claim that his termination violated state law is pre-empted by federal law. The Court finds it unnecessary to reach that issue.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

ENTER: June 7, 2001

/s/ E. Lee Schlaegel, Jr.
E. Lee Schlaegel, Jr., Circuit Judge

Prepared by:

_____

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STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 5th day of September 2002, the following order was made and entered:

Shelby D. Skaggs, Plaintiff Below,
Appellant

vs.) No. 30190

Eastern Associated Coal Corp., Defendant
Below, Appellee

The Court, having maturely considered the petition for rehearing filed by the appellee, Eastern Associated Coal Corp., by Steven P. McGowan, Ancil G. Ramey, and C. David Morrison, Steptoe & Johnson, its attorneys, on the 29th day of July, 2002, doth hereby refuse said petition for rehearing.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

29 U.S.C. § 185 (Labor Management Relations Act § 301):

Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such

organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, [sic] or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

(June 23, 1947, c. 120, Title 111, §§ 301, 61 Stat. 156.)

W. Va. Code § 23-5A-3:

Termination of injured employee prohibited; re-employment of injured employees

(a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of article four of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense.

A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement: Provided, That the

employee provides to the employer a current mailing address during this one year period.

(c) Any civil action brought under this section shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, or to any court or administrative order applying specifically to the injured employee's employer, and shall further be subject to any applicable federal statute or regulation.

(d) Nothing in this section shall affect the eligibility of the injured employee to workers' compensation benefits under this chapter.

Acts 1990, 2nd Ex. Sess., c. 12.

W. Va. C.S.R. § 85-15-3-9:

Definitions.

As used in this legislative rule, the following terms have the stated meanings unless the context of a specific use clearly indicates another meaning is intended.

* * *

3.9. "Qualified rehabilitation professional" means a person who has the education, experience and skills necessary to counsel, to make judgments, and to make recommendations concerning an injured worker's medical, physical, emotional, intellectual, or motivational ability to accept and perform suitable gainful employment and who has the skills necessary to design, implement and supervise programs to enhance an injured worker's capacity to accept and perform suitable gainful employment. The

workers' compensation health care advisory panel will establish guidelines for defining the levels of education, experience and skill necessary for a person to qualify as a rehabilitation professional under this section. A qualified rehabilitation professional need not personally have the ability to administer and interpret all medical, psychological or vocational testing, but must be able to evaluate the test results provided by other professionals. Rehabilitation counselors employed by or under contract with the commissioner or employed by the West Virginia division of rehabilitation services are presumed to be qualified rehabilitation professionals for the purposes of this definition.

3.9.1. Until the health care advisory panel establishes such guidelines for qualified rehabilitation professionals, any organization meeting the then applicable standards and requirements of the commission on accreditation of rehabilitation facilities, "Standards Manual and Interpretive Guidelines for Organizations Serving People with Disabilities," (1994) shall be presumed to be qualified unless proven otherwise.

3.9.2. Nothing in this subsection precludes an employer from developing a managed care program or a vocational rehabilitation program, defined by section 13 of these rules, to promote the worker's return to productive employment; provided that, all providers of physical and vocational rehabilitation services must meet the qualifications requirements of these rules and must be registered under section 10 to these rules.

W. Va. C.S.R. §§ 85-15-13:

Employer-Managed Physical and Vocational Rehabilitation Services.

13.1. Except with regard to section 12 of these rules, after first obtaining the commissioner's approval an employer may establish its own vocational and physical rehabilitation services program for its injured workers. Once approved, such a program will encompass all of that employer's injured workers: provided that, in a specific case for which the employer's program does not provide appropriate services, the employer will defer to the division's program and. Every [sic] such employer must file a renewal petition for extension of its approval by the first day of January of every year thereafter. Previously approved programs may continue to operate until and if renewal is denied.

13.2. In order to obtain the commissioner's approval to provide its own program, the employer must petition the commissioner for authorization to provide physical and/or vocational rehabilitation services to its injured workers. The petition must describe in detail the manner in which the employer's program functions and must affirmatively state that the employer's program meets all of the requirements of these rules. The employer's program must assure that claimant specific medical and vocational rehabilitation information is treated and handled in a confidential manner and on a need to know basis only. The employer's program may supply services over and above the minimum requirements of these rules and may pay for services which would not be paid for under these rules if the program were being operated by the division. If it is the employer's intention to contract with a vendor of physical and/or vocational rehabilitation services on a

standing basis, then the identity and qualifications of the vendor or vendors must be disclosed in the petition. Any such vendor must be registered or must obtain registration under section 10 of these rules before the vendor may provide any services.

13.3. The petition must acknowledge that the employer will undertake the processing and direct payment of all invoices and charges for physical and/or vocational rehabilitation services. If the petition is approved, the division will not be responsible for receiving, processing or issuing payorders for the invoices or charges. The employer's program may utilize any fee schedule promulgated by the division for reimbursement for services to be provided under these rules. Any provider of such services will be bound by such fee schedule in the same manner in which the vendor would be bound if the services were being provided under the division's program. Disputes over the application of the fee schedule shall be submitted to the division for resolution.

13.4. The employer must post the "petition for authorization to provide rehabilitation services" and each renewal petition at its worksite in a manner sufficient to provide all of its employees with notice of the petition. The employees may file with the commissioner comments regarding the petition. If the petition is approved, the employer may undertake the responsibilities and duties of the commissioner as stated in these rules, with the exception of section 12. The employer must post notice of the petition's approval at its worksite in a manner sufficient to provide all of its employees with notice of the approval. In addition, the employer must provide to each new employee and must annually provide to every employee thereafter, a description of its program, the services offered, and the

procedures to be followed by an injured worker to obtain such services.

13.5. After a petition is approved, the employer need not obtain the prior approval of the commissioner on any issue pertinent to an injured worker's rehabilitation services. The employer's decisions must be in writing and must inform the injured worker of his or her right to file a petition with the commissioner objecting to the decision pursuant to the provisions of section 13.6 of these rules. The written decision must explain the section 13.6 specifications for the objection petition and the time and manner in which the petition must be filed.

13.6. If an injured worker disagrees with a decision rendered by his or her employer pursuant to section 13, he or she may file with the commissioner a petition setting forth the disputed decision and the basis for the disagreement. The injured worker must file the petition with the commissioner within fifteen (15) days after receiving the employer's decision and must serve a copy of the petition upon the employer. The employer may file a response with the commissioner within fifteen (15) days after receiving the petition and must serve a copy of the response upon the injured worker. The injured worker must file any reply he or she wishes to make to the employer's response within ten (10) days after he or she receives the response. A copy of the reply must be served upon the employer. The employer must furnish the division and the injured worker with all available factual information in its possession or the possession of any vendor under its control which relates to the disputed decision. Thereafter, the commissioner must enter a protestable order affirming, modifying, or reversing the disputed decision within thirty (30) days of the receipt of all requested information. Any order entered by the commissioner pursuant to this section 13.6

may be objected to by either the injured worker or the employer pursuant to the provisions of W. Va. Code §§§§ 23-5-1 and 23-5-1h.

13.7. After an employer's petition is approved, the employer must provide the division with rehabilitation activities. These interim reports are due on the dates specified by the division in the notice of approval. An annual report of the employer's rehabilitation activities for the period covered by the division's fiscal year must be filed by the employer with the division not later than sixty (60) days following the end of each state fiscal year. The interim and annual reports must provide all information requested by the division and must be in the form required by the division. The information must be provided on both an individual injured worker basis and an aggregate basis. The employer must immediately report to the division any changes it makes with regard to vendors under a standing contract with the employer, which report must identify any new vendor and its qualifications.

13.8. Failure by the employer to comply with any of the requirements of these rules is good cause for the division to revoke the employer's authorization to provide physical and/or vocational rehabilitation services to its injured workers. If the authorization is revoked, the commissioner must provide the employer with a notice of revocation, including notice of the employer's rights to a hearing, as defined by W. Va. Code §§ 29A-5-1 et seq. Any such hearing and all appeals resulting therefrom shall be conducted in accordance with W. Va. Code §§ 29A5-1 et seq. The employer must post all notices of revocation in the manner described under section 13.4 of these rules.

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30190

SHELBY D. SKAGGS, Plaintiff Below, Appellant

vs.

EASTERN ASSOCIATED COAL CORP.,
Defendant Below, Appellee

Honorable E. Lee Schlaegel, Jr., Judge
Circuit Court of Boone County
Civil Action No. 99-C-168

BRIEF OF APPELLEE

(Filed Feb. 11, 2002)

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* * *

IV. CROSS-ASSIGNMENT OF ERROR

A. BECAUSE SKAGGS' ARGUMENT THAT HE WAS OR MAY HAVE BEEN ABLE TO PERFORM HIS REGULAR JOB AND SHOULD NOT HAVE BEEN TERMINATED ATTACKS

A DECISION MADE UNDER ARTICLE III(J)(3) OF THE NBCWA OF 1998, THEREBY REQUIRING INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT PROVISION, THE TRIAL COURT SHOULD HAVE RULED THAT SKAGGS' WRONGFUL DISCHARGE CLAIM WAS PREEMPTED.

In light of granting summary judgment in favor of Eastern on the basis that Skaggs failed to establish a prima facie case of wrongful discharge under the anti-discrimination provisions of the Worker's Compensation Act, the trial court determined that it was unnecessary to address Eastern's argument that Skaggs' wrongful discharge claim was preempted by federal law because he was terminated under the provisions of the NBCWA. (Exhibit A at 6). Thus, it is necessary for Eastern to cross-assign as error the trial court's failure to hold that Skaggs' wrongful discharge claim is preempted by the NBCWA.

Skaggs does not contest that the terms and conditions of his employment were governed by the NBCWA of 1998, a collective bargaining agreement enforceable under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. The United States Supreme Court has often spoken on the preemptive force of Section 301. The following language from the Court's decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877 (1988) defines the scope of preemption under Section 301.

> In *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962), we were confronted with a straightforward question of contract interpretation; whether a collective-bargaining agreement implicitly prohibited a strike that had been called by the union. The

Washington Supreme Court had answered that question by applying state-law rules of contract interpretation. We rejected that approach, and held that § 301 mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes.

* * *

Our discussion of the pre-emptive scope of § 301 bears repeating:

> "It was apparently the theory of the Washington court that, although *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S. Ct. 912, requires the federal courts to fashion, from the policy of our national labor laws, a body of federal law for the enforcement of collective-bargaining agreements, nonetheless, the courts of the States remain free to apply individualized local rules when called upon to enforce such agreements. This view cannot be accepted. The dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute. Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills, requiring issues raised in suits of a kind covered by § 301 to be decided according to the precepts of federal labor policy.
>
> "More important, the subject matter of § 301(a) 'is peculiarly one that calls for uniform law.' . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a

disruptive influence upon both the negotiation and administration of collective agreements.

Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

"The importance of the area which would be affected by separate systems of substantive law makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the effort of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. With due regard to the many factors which bear upon competing state and federal interests in this area, . . . we cannot but conclude that in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." 369 U.S., at 103-104, 82

> S.Ct., at 576-577 (citations omitted; footnote omitted).

Lingle, 486 U.S. at 403-404 & n.3.

In *Electrical Workers v. Hechler,* 481 U.S. 851, 107 S. Ct. 2161 (1987), the Supreme Court considered whether a Florida tort law claim was preempted by a substantive provision of a collective bargaining agreement which governed the terms and conditions of the plaintiff's employment. The dispute was centered on whether the employer had failed in its state law duty to provide plaintiff a safe place to work. The collective bargaining agreement at issue contained language addressing the relative responsibilities of the union and management for workplace safety issues. The Court held that the collective bargaining agreement preempted the plaintiff's state law claim because "[t]he threshold inquiry for determining if a cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties." *Hechler* 481 U.S. at 860.

In the case at bar, Skaggs alleged that Eastern decided to terminate his employment because he filed for and/or received workers' compensation benefits. Eastern articulated a legitimate, non-discriminatory reason for its decision to terminate the appellant's employment – application of Article III(j)(3) of the NBCWA, which provides in relevant part:

> That once employed an Employee cannot be terminated . . . for medical reasons over his objection without the concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in

> physical condition which prevents the Employee from performing his regular work.

NBCWA of 1998, Art. III(j)(3) (Bituminous Coal Wage Agreement, attached as Exhibit B). The NBCWA further provides, "[t]he management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer." NBCWA, Art. IA(d). In order to rebut Eastern's legitimate, non-discriminatory reason, Skaggs must attack its application of the collective bargaining agreement provisions. Because the contract must be construed, Skaggs' claim of workers' compensation discrimination under W.Va. Code § 23-5A-1 is preempted under *Lingle* and its progeny.

Admittedly, this issue was addressed in the Court's decision in *Yoho v. Triangle PWC, Inc.*, 175 W.Va. 556, 336 S.E.2d 204 (1985), and this Court ruled that a collective bargaining agreement provision which permitted an employer to discharge the plaintiff after she had been absent from work for 12 months due to a workers' compensation claim did not preempt the plaintiff's claim of discrimination under West Virginia Code § 23-5A-1. The Court based its reasoning on the United States Supreme Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S. Ct. 1904 (1985), in which the Court said that not all labor disputes are preempted by Section 301, and that the parties to a collective bargaining agreement are not free to contract for what is illegal under state law. *Yoho*, 336 S.E.2d at 207.

However, Eastern asserts that the *Yoho* decision misapplies the United States Supreme Court's decision in *Lueck*. Certainly, parties to a collective bargaining agreement may not by contract authorize an act which is unlawful under state law, and that is what was recognized

in *Lueck*. However, the provision at issue in this case does not authorize unlawful conduct. It merely confers upon Eastern the right to act lawfully in terminating an employee where the employee will not be returning to work with the Company due to a deterioration in the employee's physical condition. Skaggs' claim that Eastern violated W. Va. Code § 23-5A-1 is preempted and should have been dismissed.

V. CONCLUSION

The award of summary judgment in this case was clearly warranted. First, the anti-discrimination provisions under W. Va. Code § 23-5A-3 do not apply in the case because it was undisputed that the appellant had reached the maximum level of medical improvement and was no longer receiving, nor eligible to receive temporary total disability benefits. Second, there was no evidence that the appellee violated W. Va. Code § 23-5A-1 or acted contrary to the ruling in *Yoho*, which permits an employer to terminate an employee who is off work due to a work-related injury (and not receiving or eligible to receive temporary total disability benefits), as long as the employer is acting pursuant to a facially neutral policy which is evenly applied. This Court also recognized in *Powell*, that an employer may terminate an injured employee who is no longer qualified to perform the duties of his or her job. Finally, the trial court did not abuse its discretion by refusing leave to amend the pleadings where the appellant's motion was untimely, prejudicial to appellee, and did not present any issue required for the adjudication of the merits of the case.

* * *

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 30190

SHELBY D. SKAGGS, Plaintiff Below, Appellant

vs.

EASTERN ASSOCIATED COAL CORP., Defendant Below, Appellee

Honorable E. Lee Schlaegel, Jr., Judge
Circuit Court of Boone County
Civil Action No. 99-C-168

PETITION FOR REHEARING

(Filed Jul. 29, 2002)

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* * *

employee who *cannot* return to his regular duties, regardless of whether the employee's physical disability is work-related or non-work-related, is not a violation of the law. Nor is an employer required to create a new job, move another employee, promote the injured employee, or

violate another employee's rights under a collective bargaining agreement in order to reemploy an injured employee *who never demanded reinstatement* and *who was medically prevented from returning to his regular work*. *See* W. Va. Code 23-5A-3(b). Therefore, this Court should have affirmed the trial court's award of summary judgment in favor of the appellee.

C. BECAUSE SKAGGS' ARGUMENT THAT HE WAS OR MAY HAVE BEEN ABLE TO PERFORM HIS REGULAR JOB AND SHOULD NOT HAVE BEEN TERMINATED ATTACKS A DECISION MADE UNDER ARTICLE III(J)(3) OF THE NBCWA OF 1998, THEREBY REQUIRING INTERPRETATION OF A COLLECTIVE BARGAINING AGREEMENT PROVISION, THE COURT ERRED BY NOT RULING THAT SKAGGS' WRONGFUL DISCHARGE CLAIM WAS PREEMPTED.

In light of granting summary judgment in favor of Eastern on the basis that Skaggs failed to establish a prima facie case of wrongful discharge under the anti-discrimination provisions of the Worker's Compensation Act, the trial court determined that it was unnecessary to address Eastern's argument that Skaggs' wrongful discharge claim was preempted by federal law because he was terminated under the provisions of the NBCWA. This Court erred by failing to ever address Eastern's cross-assignment of error that the trial court should have held that Skaggs' wrongful discharge claim is preempted by the NBCWA.

Skaggs does not contest that the terms and conditions of his employment were governed by the NBCWA of 1998, a collective bargaining agreement enforceable under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185. The United States Supreme Court has recognized the federal labor-law preemptive force of Section 301 over disputes that are subject to the provisions of the National Labor Relations Act or subject to grievance arbitration under a collective bargaining agreement. *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 82 S. Ct. 571, 7 L.E.2d 593 (1962) (state law preempted when labor dispute arises from alleged violation of collective bargaining agreement because application of federal law necessary to preserve uniformity of law applied to collective bargaining agreements and effectiveness of arbitration); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220, 105 S.Ct. 1904, 85 L.E.2d 206 (1985) (state law claims that are "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract" are preempted.)

The Supreme Court further defined the scope of preemption under Section 301 in *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 405-06, 108 S. Ct. 1877, 100 L.Ed. 2d 410 (1988):

> If the resolution of a state-law claim depends upon the meaning of a collective bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are states) is preempted and federal labor-law principles – necessarily uniform throughout the Nation – must be employed to resolve the dispute.

Federal labor-law preemption under Section 301 has been applied to workers compensation discrimination claims that require the interpretation of a collective bargaining agreement. *See Troconis v. Lucent Technologies, Inc.,* 160 F. Supp. 2d 150 (D. Mass 2001) (Claims of discrimination and retaliation under workers compensation law dismissed as preempted by federal law because interpretation of collective bargaining provisions governing medical leave, absences, demotion, job reclassification, and acts of employer or union discrimination required); *Biagini v. Berkshire Concrete Corp.,* 190 F. Supp. 2d 170 (D.Mass 2002) (Employer's summary judgment based on federal preemption allowed where employee's claims that employer discharged him, refused to rehire him, and discriminated against him based on his receipt of workers' compensation benefits depended on interpretation of terms in collective bargaining agreement).

In the case at bar, Skaggs alleged that Eastern decided to terminate his employment because he filed for and/or received workers' compensation benefits. Eastern articulated a legitimate, non-discriminatory reason for its decision to terminate the appellant's employment – application of Article III(j)(3) of the NBCWA, which provides in relevant part:

> That once employed an Employee cannot be terminated . . . for medical reasons over his objection without the concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents the Employee from performing his regular work.

NBCWA of 1998, Art. III(j)(3) (Bituminous Coal Wage Agreement, attached as Exhibit B to Brief of Appellee). The NBCWA further provides, "[t]he management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer." NBCWA, Art. IA(d). In an attempt to rebut Eastern's legitimate, non-discriminatory reason, Skaggs has attacked Eastern's application of the collective bargaining agreement provisions by claiming that there were two jobs in the mine – dispatcher and motorman – which he could have performed. It is undisputed, however, that the NBCWA of 1998 contains seniority provisions and sets forth a bidding process which governs placement in an open, classified position. It was not simply a matter of placing the appellant into an open job, or of creating one, nor was Eastern required to do so. *See U.S. Airways v. Barnett*, 122 S. Ct. 1516, 152 L. Ed. 2d 589, 202 U.S. Lexis 3034 (2002) (The ADA does not require employer to assign disabled employee to particular position where another employee is entitled to that position under the employer's established seniority system). Because the contract must be construed, Skaggs' claim of workers' compensation discrimination under W. Va. Code § 23-5A-1 is preempted under *Lingle* and its progeny and should have been dismissed.

IV. CONCLUSION

This Court's opinion misinterpreted the decision of the Circuit Court as based upon contract principles, rather than judicial estoppel; departed from this Court's prior decisions which allow employers to enforce facially-neutral provisions of collective bargaining agreements by discharging employees who have reached their maximum

degree of medical improvement and cannot return to their workforce; and completely failed to address Eastern's federal preemption argument. The effect of this Court's opinion on both large and small businesses will be great, precluding employers, because of the threat of civil liability, from replacing employees who are unable to the workforce and are being trained to work in a different field, and thereby denying permanent employment to other workers. WHEREFORE, the appellee, Eastern Associated Coal Corporation, respectfully requests that this Court grant its Petition for Rehearing.

EASTERN ASSOCIATED COAL CORP.
By Counsel

STEPTOE & JOHNSON PLLC
Of Counsel

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NATIONAL BITUMINOUS COAL WAGE AGREEMENT OF 1998

* * *

Art. IA empt from the provisions of this Agreement as supervisors, more men than are necessary for the safe and efficient operation of the mine, taking into consideration the area covered by the workings, roof conditions, drainage conditions, explosion hazards, and the ability of supervisors, due to thickness of the seam, to make the essential number of visits to the working faces as required by law and safety regulations.

Section (c) **Supervisors Shall Not Perform Classified Work**

Supervisory employees shall perform no classified work covered by this Agreement except in emergencies and except if such work is necessary for the purpose of training or instructing classified Employees. When a dispute arises under this section, it shall be adjudicated through the grievance machinery and in such proceedings the following rule will apply: the burden is on the Employer to prove that classified work has not been performed by supervisory personnel.

Section (d) **Management of the Mines**

The management of the mine, the direction of the working force and the right to hire and discharge are vested exclusively in the Employer.

Section (e) **Union's Rights**

Authorized representatives of the Union shall be permitted reasonable access to the mine property to insure compliance with this Agreement. The Em-

* * *

Art. III

Section (j) **Physical Examination**

(1) Physical examination, required as a condition of or in employment, shall not be used other than to determine the physical condition or to contribute to the health and well-being of the Employee or Employees. The retention or displacement of Employees because of physical conditions shall not be used for the purpose of effecting discrimination.

(2) When a physical examination of a recalled Employee on a panel is conducted, the Employee shall be allowed to return to work at that mine unless he has a physical impairment which constitutes a potential hazard to himself or others.

(3) That once employed, an Employee cannot be terminated or refused recall from a panel or recall from sick or injured status for medical reasons over his objection without the concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents the Employee from performing his regular work. Each party shall bear the cost of examination by the physician it

designates and shall share equally the cost of examination by the jointly designated physician.

(4) Where an Employer challenges the physical ability of an Employee or panel member to perform his regular work and is subsequently proven wrong, the Employee shall be compensated for time lost due to the Employer's challenge, including medical examination expenses incurred in proving his physical ability to perform the requirements of the job.

Section (k) **Minimum Age**

No person under 18 years of age shall be employed inside any mine nor in hazardous occupations outside any mine; provided, however, that where a state law provides a higher minimum age, the state law shall govern.

Section (l) **Workers' Compensation and Occupational Disease**

Each Employer who is a party to this Agreement will provide the protection and coverage of the benefits under workers' compensation and occupational disease laws, whether compulsory or elective, existing in the states in which the respective Employees are employed. Refusal of any Employer to carry out this directive shall be deemed a violation of this Agreement. Notice of compliance with this section shall be posted at the mine.

Section (m) **Safety Equipment and Protective Clothing Allowance**

Safety equipment and devices, including electric cap lamps, self-rescuers, personal ear plugs, prescription safety glasses exclusive of eye examination costs,

* * *

Article XVII – SENIORITY

Section (a) **Definition of Seniority**

Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded.

In awarding bids on job postings, the parties agree that management will not show favoritism or discrimination. To help senior Employees achieve promotion, they shall be given preference to the extent practicable in the filling of temporary vacancies as set out in section (c) of Article XIX (Classification).

Section (b) **Reduction; Realignment**

(1) Reduction in Work Force

In all cases where the working force is to be reduced, Employees with the greatest seniority at the mine shall be retained provided that they have the ability to perform available work.

(2) Realignment Procedure

When the number of Employees within a job title is to be reduced or Employees are to be realigned, the following procedure shall apply:

(a) The senior Employees (mine seniority) in each job title shall be retained in their respective job title, regardless of shift or portal, up to the number needed in that job title.

(i) If, after such reduction of jobs within a job title, there is an excess of jobs on any shift, that excess number of junior Employees (mine seniority) on that shift will be displaced as to shift but retained within the job title.

(ii) any Employee who is displaced as to shift within a job title will, to the extent his seniority permits, be reassigned a shift on the basis of shift preference, and for this purpose may displace any Employee junior to him (mine seniority) on any shift within the job title. Any Employee so displaced will be reassigned in the same manner. Any Employees not displaced as to shift under this procedure will retain their pre-realignment shifts.

(b) Those Employees displaced from their job title shall be assigned available jobs on the basis of mine seniority and ability to step in and perform the work of the job at the time, using the following procedure:

(i) The senior Employee in each instance shall be assigned to the job grade having the greatest standard daily wage rate and within which there is an available job. However, if and only if by the end of the meeting required by Section (c) of this Article XVII, the Union informs

the Employer in writing that any such displaced Employee wishes to waive the opportunity for the greatest standard daily wage rate in favor of a particular shift, that preference shall be followed to the extent the Employee's seniority permits. In order to be prepared to so inform the Employer of such preference at any such meeting called by the Employer, it is the responsibility of the Union to predetermine Employee preferences.

(ii) Assignment of classifications and job titles within a job grade is within the exclusive discretion of the Employer. However, where there is more than one available job within that job grade, such assignments to the Employees to be assigned within that grade will be made on the basis of retaining in that grade the maximum number of Employees being so assigned who have the ability to step in and perform the available work at that time.

(iii) Shift assignment, except as provided for by subparagraph (i) above, shall be considered only after assignment of job titles has been completed. If within a job title there are two or more shifts available, displaced Employees assigned such job title shall be given shift preference based upon mine seniority.

(c) Any Employee who is not retained in his job title and who does not have the ability to perform an available job under the above procedure shall, to the extent his seniority permits, displace the least senior Employee at the mine holding a job which such senior Employee has the ability to step into and perform at that time. Any Employee displaced under this paragraph (c) shall have the same rights under this paragraph (c). Employees not retained under this procedure will be laid off.

(d) For purposes of this Realignment Procedure only, any Employee on sick or injured status who otherwise ahs the ability to perform available work will not be denied a job under this procedure solely because of his sick or injured status.

(e) For purposes of this Realignment Procedure only, giving "shift preference" means that Employees will be assigned available jobs in the following descending order: (1) Day, (2) Afternoon, (3) Midnight, unless by the end of the meeting required by Section (c) of this Article XVII the Union informs the Employer in writing that a particular Employee has requested that some other preference be applied to him, in which case that other preference shall be followed. It is the responsibility of the Union to predetermine alternate shift preferences so as to be prepared to submit such alternate preferences at any such meeting called by the Employer.

Section (c) **Layoff Procedure**

In all cases where the working force is to be reduced or realigned, management shall meet with the mine committee at least 24 hours in advance and review the available jobs and the individuals to be laid off, retained or realigned.

Within five (5) days after an Employee is notified that he is to be laid off, he must fill out a standardized form and submit it to mine management. On this form, the laid-off Employee shall list: (1) his years of service at the mine; (2) his years of service with the Employer; (3) his previous mining experience with other Employers and the years of service with each; and (4) the jobs he is able to perform and for which he wishes to be recalled. Additionally, the Employee may also list, on the standardized form, (5) the

mines of his Employer within any UMWA district on whose panel he wishes his name to be placed.

Upon receipt of the completed form, the Employer shall within seven calendar days, distribute a copy of the completed form to the Recording Secretary of the Employee's local union and to the respective panel custodians of all mines listed by the Employee at mines where he wishes his name to be placed on the panel in accordance with the provisions of this section.

Section (d) **Panels**

Employees who are idle because of a reduction the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in section (a). A panel member shall be considered for every job which he has listed on his layoff form as one to which he wishes to be recalled. Each panel member may revise his panel form once a year.

Section (e) **Panel Custodians**

The superintendent of the mine and the Recording Secretary of the local union shall be joint custodians of the panel records. It shall be the obligation of the laid-off Employee to keep the custodians of all mine panels on which he is entitled to place his name informed of any change of address and/or telephone number where he may be regularly reached. Notice to the last known address of the laid-off Employee by certified mail shall be sufficient notice of recall. The Employee so notified may either accept or reject the job which is available; but if the Employee rejects a job which he has listed as one to which

he wishes to be recalled or fails to respond within four calendar days after receipt of such notice or accepts but fails to report for work in a reasonable time his name shall be removed from the panel at that mine and he shall sacrifice his seniority rights at that mine.

Section (f) **Panel Members Accrue Seniority**

Employees who are placed on a panel shall retain the seniority earned prior to their layoff, and, in order to protect their relative seniority standing, will continue to accrue seniority while on the panel. Laid-off Employees who place their names on panels at other mines shall not accrue seniority on the mine panels other than their own.

Section (g) **Right to be Recalled**

Any person on the panel list who secures casual or intermittent employment during the period when no work is available for him at the operation shall in no way jeopardize his seniority rights while engaged in such temporary employment. However, any person on the pane list who secures regular employment at another operation, or outside the industry, and does not return to work when there is available employment at the mine for those on said panel, shall sacrifice his seniority rights at the operation and shall have his name removed from the panel list.

Section (h) **Recall of Persons on Layoff Status**

When a job or training vacancy at a mine exists which is not filled by Employees within the active working force or from the mine panel, the panel custodians will review the list of Employees on the panel from other mines and

the Employer shall recall to employment Employees on layoff status in the following order:

(1) If there are no Employees on the mine panel with the ability to perform the work of the job, then, the Employer shall recall the senior Employee who has such ability from the Employer's other mines within the same UMWA district who has requested his name to be placed on the panel at that mine and has listed the job to be filled as one for which he wishes to be recalled (length of service with an Employer at a mine for purposes of this provision includes total years of service with the Employer within the UMWA district);

(2) If there are no Employees on the mine panel or the District-Employer panel, who have the ability to perform the work of the job, then, the Employer shall recall the senior Employee from the Employer's other mines located in geographically contiguous UMWA Districts who has such ability and is entitled to under section (c)(5) and has requested his name to be placed on the panel at that mine and has listed the job to be filled as one for which he wishes to be recalled (length of service with the Employer at the mine for purposes of this provision includes total years of service with the Employer).

(3) If there are no Employees on the mine panel or the District-Employer panel or on the geographically contiguous District-Employer panel, who have the ability to perform the work of the job, then, the Employer shall recall the senior Employee from the Employer's other mines from the remaining UMWA districts, who has such ability and is entitled to under Section (c)(5) and has requested his name to be placed on the panel at the mine and has listed the job to be filled as one for which he

wishes to be recalled (length of service with the Employer at the mine for purposes of this provisions includes total years of service with the Employer).

Signatory companies and coal producing divisions thereof, and wholly owned and controlled coal producing subsidiaries and wholly owned and controlled coal producing affiliates, shall be treated as one and the same Employer for panel rights purposes.

Section (i) **Job Bidding**

Filling of all permanent vacancies and new jobs created during the term of this Agreement will be made on the basis of mine seniority as set forth in the following procedure:

(1) The job or vacancy shall be posted by management in a conspicuous place at all portals of the mine for a period of five (5) calendar days, but no less than three (3) production days, and will be properly identified as to portal (underground mines), job title, wage rate, at non-rotating mines as to shift, and the most recent measurements of respirable dust in the work place (underground mines). If the new job or vacancy does not yet exist, the estimated date when the job or vacancy will exist will also be posted.

(2) Any Employee who believes he has the ability to perform the work of the permanent vacancy or new job shall be entitled to bid on such vacancy during the five-day posting period.

In addition, eligible panel members will also be considered on the basis of seniority as defined in section (a) above for permanent vacancies or new jobs that the

panel member listed as jobs to which he wished to be recalled. For purposes of this section, a panel member shall be presumed to have bid on each job he has listed on his layoff form as one for which he wished to be recalled.

(3) At the close of the posting period, upon request, the Employer shall make available to the Union panel custodian, the names of all Employees who have bid and panel members who listed the job as one for which they wished to be recalled. Within three (3) production days after the end of the posting period, the senior Employee having the ability to perform the work of the job (including panel members) making a bid for such permanent vacancy or new job shall be selected from the applicants.

In order to fill the present job of the successful bidder, he may be required to remain on his present job for a period of time not to exceed 30 days. If during that 30-day period, the job for which he has been selected is filled by any other Employee, the successful bidder shall receive the established rate of pay for the job for which he has been selected – if that rate is higher than his present job rate – for the actual hours he would have worked on the new job had he not been retained on his present job.

(4) All Employees absent from work due to illness or other legitimate reason during the posting period shall be notified by management of the vacancy. An Employee who is on leave of absence working for the local, district or International Union, if he so requests, shall also be notified by management of the vacancy. The Employer shall, on the date of the posting, give notice to such Employees by certified mail to their last known address.

(5) During the posting period and the selection period, the management shall have the right to fill such

vacancy with an Employee they may select. However, the experience an Employee has gained during the posting and selection period shall not be considered as evidence of his ability to perform the job.

(6) No claim shall be recognized by either the Employer or Union representatives for any vacancy after the posting period and the job has been filled by the senior Employee making a bid for the same who has the ability to perform the work of the job.

(7) If the senior Employee bidding withdraws his bid before the end of the posting period, notice of the withdrawal shall be posted next to the job posting and the posting period shall be extended for at least 48 hours to include at least two full production days.

(8) On no more than two occasions during the term of this Agreement may an Employee be awarded a vacancy or new job which carries the same or lower standard daily wage rate than the job from which he is bidding; except, however, that if there are otherwise no eligible bidders, the senior bidder who has the ability to perform the work of the job shall be awarded such vacancy or new job. Assignment upon realignment or upon being recalled from a panel shall not constitute a bid for purposes of this paragraph, but shall be considered the job from which the Employee is bidding for purposes of determining his eligibility for award of the job he next bids. This paragraph shall not operate to deny an Employee the award of a bid from an inside job to an outside job provided that Employee has not previously, during the term of this Agreement, successfully bid from an inside job to an outside job; nor shall it operate to deny an Employee the award of a bid from a job to which he was realigned if such

job to which he was realigned carries a higher standard daily wage rate than the job to which he last bid before the realignment. No limitation will apply to an Employee who bids on a vacancy or new job which carries a higher wage rate than his present rate.

(9) If an Employee withdraws his bid before the end of the posting period, he shall be ineligible for that job in that instance, but shall retain all bidding privileges for all subsequent jobs. If an Employee does not withdraw his bid before the end of the posting period and is selected for the job, he must accept the job provided the job was properly identified.

(10) If the job which is posted involves work in a "less dusty area" of the mine (dust concentrations of less than one milligram per cubic meter), the provisions of this Article shall not apply if one of the bidders is an Employee who is not working in a "less dusty area" and who has received a letter from the U.S. Department of Health and Human Services informing him that he has contracted black lung disease and that he has the option to transfer to a less dusty area of the mine. In such event, the job in the less dusty area must be awarded to the letterholder on any production crew who has the greatest mine seniority. Having once exercised his option, the letterholder shall thereafter be subject to all provisions of this Article pertaining to seniority and job bidding. This section is not intended to limit in any way or infringe upon the transfer rights which letterholders may otherwise be entitled to under the Act.

(11) The provisions of paragraph (3) above shall apply to postings for the positions of continuous miner operator or roof bolter on continuous mining sections or

roof bolter on conventional mining sections which are required by this Agreement to be permanently assigned a full-time helper, except as follows: Subject to the applicable provisions of this Article, permanent vacancies in these machine operator positions shall be awarded to the senior bidder having the ability to perform the work of the job, including an operator or fully-trained helper, but if there are no such bidders the senior fully-trained helper on the shift shall be promoted to such job.

Section (j) **Training for Vacancy Not Filled by Bidding**

Subject to the provisions of Article XVI (Training), a permanent vacancy and new job which remains unfilled after having been posted in accordance with the provisions of section (i) of this Article may be filled by hiring a new applicant who has the ability to perform the work. If no such applicant is available, and the vacancy is to be filled, a training opportunity for such vacancy shall be posted for a period of seven calendar days, but no less than five (5) production days, and will be identified as a training opportunity for the specific job involved. The Employee who is to be trained shall be selected from the applicants in accordance with the provisions of Article XVI, section (g) (Training).

The successful applicant shall be offered such on-the-job training or other more formal training opportunities and instruction as determined by management, taking into consideration the complexity, skill and knowledge required for successful performance of the specific job in question.

Section (k) **Transfer to Other Mines of Employer**

Employees laid off in a reduction in force shall at their request be placed on the panel of the other mine or mines of the same Employer in the same UMWA district and the Employee's choice of other UMWA districts, provided that Employees laid off after the effective date of this Agreement shall make their requests in writing within the five (5) calendar days following their layoff. Signatory companies and coal producing divisions thereof and wholly owned and controlled coal producing subsidiaries and wholly owned and controlled coal producing affiliates shall be treated as one and the same Employer for panel rights purposes.

When a mine is being abandoned or being closed or there is a reduction in force and work is available at the other mine or mines of the same Employer and the Employees have requested their names be placed on the panel or panels of such mine or mines, the Employees from the mine being abandoned or closed or the Employees laid off in the reduction in force, shall be transferred to the other mine or mines where work is available. They shall be transferred in line with their position on their former mine's panel list but their seniority at the mine to which they are being transferred shall not begin until the date they start work at the new mine with the following exceptions:

When Employees from the mine being abandoned or closed are required to remain their to assist in closing or dismantling work, they will have the right to transfer later, but their seniority will be retroactive to the date when they would have been transferred had they not been

required to remain at the mine being abandoned on dismantling work.

Should such closed or abandoned mine be re-opened or should work be available for the Employees laid off in a reduction in force, they will be permitted to return to the former mine with full accumulated seniority therein.

Section (l) **Leave of Absence**

Employees who have an official request for a leave of absence shall be granted leave to participate in Union activities and to serve as district or international officers or representatives and shall retain their seniority and accrue seniority while they are on such leave. Employees who have an official request for a leave of absence shall be granted leave to accept a temporary Union assignment, not to exceed four (4) consecutive months, and upon the expiration of such leave shall be entitled to return to their former jobs and shifts. Except in cases of District or International Conventions or District Conferences relating to national contract negotiations, no more than two (2) Employees may accept such temporary Union assignments from the same mine at the same time. Permanent Union appointees and those Employees who are elected to district or international office shall be entitled to return to a job, provided that Employees with greater seniority at the mine are not on layoff status, and may bid on such vacancies as are posted. Where, by prior practice or custom, a permanent Union officer or appointee is entitled to return to this job, that practice shall be continued. This provision is retroactive to April 1, 1964.

Section (m) **Permanent and Temporary Supervisors**

Employees who are promoted to a permanent supervisory position exempt from coverage under this Agreement and Employees who are permanent supervisors on the Effective Date of this Agreement shall forfeit their original seniority and panel rights.

Employees may perform supervisory work exempt from this Agreement on a temporary basis, not to exceed sixty (60) working days (cumulative) during any contract year, without loss of seniority.

Section (n) **Shift Preference**

When a permanent vacancy or new job is filled at a mine where shift rotation is not practiced, the Employee with the greatest seniority shall be given preference with respect to the day, afternoon and midnight shift work, on the basis of the same procedure set forth in the job bidding section of this Article.

Art XXIV

Section (j) **Waiver of Time Limits**

By agreement the parties may waive the time limits set forth in each step of the grievance procedure.

Section (k) **Prior Agreement**

Any dispute and/or difference which as of the Effective Date of this Agreement is in the process of adjustment under the Settlement of Disputes section of the prior Agreement or any dispute and/or difference presented on

or after the Effective Date of this Agreement which is based on the occurrence or nonoccurrence of an event which arose prior to the Effective Date of this Agreement shall be processed under the procedural provisions of this Agreement and shall be resolved under the applicable provisions of the prior Agreement. Decisions reached under this provisions shall be final and binding. All decisions of the Arbitration Review Board rendered prior to the expiration of the National Bituminous Coal Wage Agreement of 1978 shall continue to have precedential effect under this Agreement to the extent that the basis for such decisions have not been modified by subsequent changes in this Agreement.

Article XXIV – DISCHARGE PROCEDURE

Section (a) **Just Cause Required**

No employee covered by this Agreement may be disciplined or discharged except for just cause. The burden shall be on the Employer to establish grounds for discharge in all proceedings under this Agreement.

Section (b) **Procedure**

Where management concludes that the conduct of an Employee justifies discharge, the Employee shall be suspended with intent to discharge and shall be given written notice stating the reason, with a copy to be furnished to the Mine Committee. After 24 hours, but within 48 hours, the Employee shall be afforded the right to meet with the mine superintendent or manager. At such meeting, a member or members of the Mine Committee shall be present and, if requested by the Employee or the Mine

Committee, a representative of the District shall also be present. When the district representative requests, the forty-eight hour time limit will be extended by an addition 48 hours. The Employer shall be entitled to have an equal number of representatives at the meeting.

Section (c) **Suspension**

If the Employer informs the Employee at the meeting between the Employee and the mine superintendent or manager that he still intends to discharge the Employee (or if no meeting was requested), the Employee remains suspended with intent to discharge for a period of time necessary to permit him to file a grievance and have it arbitrated. If the Employee does not file a grievance within five days of the notice of suspension with intent to discharge, the discharge shall become effective immediately.

Section (d) **Immediate Arbitration**

(1) If the District believes that just cause for discharge does not exist, it shall arrange with the employer for immediate arbitration of the dispute, bypassing steps one through there of the grievance procedure.

(2) The next available district arbitrator shall immediately be assigned to hear the case.

(3) The appropriate district arbitrator shall hear the case within five days. At the conclusion of the hearing, the district arbitrator shall at that time announce his decision which shall be binding on all parties. Following the hearing, the arbitrator shall forthwith reduce his decision to writing within 10 days. If the arbitrator determines that

the Employer has failed to establish just cause for the Employee's discharge, the employee shall be immediately reinstated to his job. if the arbitrator determines that there was just cause for the discharge, the discharge shall become effective upon the date of the arbitrator's decision.

Section (e) **Regular Arbitration**

If neither the Employee nor the Mine Committee request immediate arbitration, the Employee shall be discharged at the conclusion of the fifth day of his suspension, and his case shall be processed in accordance with the provisions of article XXIII (Settlement of Disputes).

Section (f) **Compensation for Lost Earnings**

In all cases where it is determined that just cause for discharge has not been established, the Employee shall be reinstated and compensated for lost earnings at his applicable straight and premium time rates prior to discharge. Provided, however, that such case shall be taken up within five (5) days from the date of discharge.

Article XXV – DISCRIMINATION PROHIBITED

Neither the Employer nor the Union shall discriminate against any Employee or with regard to the terms or availability of classified employment on the basis of race, creed national origin, sex, age, political activity, whether intra-Union or otherwise. In addition, the Employer and Union agree that they will adhere to applicable provisions of the Vietnam Era Readjustment Assistance Act of 1974,

the Rehabilitation Act of 1973, and the Americans With Disabilities Act.

Article XXVI – DISTRICT AGREEMENTS

Section (a) **New Districts**

New Districts of the United Mine Workers of America may be established.